EDITOR'S NOTE

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 85-4001

Michael Marnell Smith,

Appellant,

versus

Raymond K. Procunier,
Director of the Department of
Corrections,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, District Judge.

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Judge Widener and Judge Warriner, United States District Judge sitting by designation.

For the Court.

CLERK

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-6001

Michael Harnell Smith

Appellant,

versus

Raymond K. Procunier, Director
of the Department of Corrections,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, Chief Judge. (CA 82-484-N)

Argued: April 5, 1985 Decided: May 10, 1985

Before WIDENER and HARNAGHAN, Circuit Judges, and WARRINER, United States District Judge for the Eastern District of Virginia, sitting by designation.

Richard Bonnie (J. Lloyd Snook, III; Paxson, Smith, Gillian & Scott; Richard J. Bonnie on brief) for Appellant; James E. Kulp, Senior Assistant Attorney General (Gerald L. Baliles, Attorney General on brief) for Appellee.

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[redacted], Circuit Judge.

It has not infrequently been observed that there must be a better, more expeditious, way for dealing with cases which present the most stressful and distressful decisions with which a judge or panel of judges may be faced, namely, those involving appeals from denials of habeas corpus relief to criminal defendants convicted and sentenced to die. The offense here occurred on May 23, 1977. Michael Darnell Smith was convicted by a jury in James City County, Virginia on November 2, 1977 for the capital murder and rape of a young woman. On the following day, November 3, 1977, the jury heard evidence at the penalty/sentencing phase and recommended a sentence of death. In doing so, the jury had before it the Commonwealth's claim that there were two separate aggravating circumstances, one of dangerousness, the other of vileness. The jury found separately, with respect to each aggravating circumstance, that it alone merited imposition of the death penalty.

There followed the usual panoply of legal maneuvers:

1. An automatic appeal to the Supreme Court of Virginia, which affirmed the conviction and the death sentence. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978).

2. A denial by the Supreme Court of the United States of a petition for a writ of certiorari. Smith v. Virginia, 441 U.S. 967 (1979).

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3. A denial of a state court petition for writ of habeas corpus on March 14, 1980 following an evidentiary hearing on Smith's claim that there had been ineffective assistance of counsel.

4. The filing, on June 28, 1982, of a petition in the United States District Court for the Eastern District of Virginia for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. A magistrate issued a written report proposing dismissal of the petition. On December 4, 1984 the district court did so.

Now, on appeal, the case reaches us on the following issues:

1. Whether a Fifth Amendment violation occurred when a psychiatrist, consulted at the instance of Smith's counsel, was wrongly permitted to testify in the sentencing phase of the case about incriminating statements concerning an earlier attack Smith described during the psychiatric interview.

2. Whether the assistance of counsel representing Smith at the sentencing phase was ineffective.

3. Whether jury instructions at the sentencing phase unconstitutionally compromised Smith's right to an individualized determination that death was the appropriate punishment.

It is evident that guilt is not contested. Smith questions solely the correctness of the sentencing procedures.

At the outset we are confronted with a contention by

the Commonwealth that the absence of an objection by counsel to the psychiatric testimony under Wainwright v. Sykes, 433 U.S. 72 (1977) foreclosed the making of the point. The case imposes a burden on the convict to show cause for and prejudice in the failure to raise the issue.

That question under Wainwright v. Sykes has plagued the Court in prior instances. Potentially it could do so here for there is reason to doubt whether counsel for Smith could muster sufficient reason to constitute trial counsel's failure to object inexcusable neglect. The testimony of a psychiatrist whose interview with Smith took place through the initial urging of defense counsel was under Virginia law proper, even though his testimony was severely damaging to the defendant. Gibson v. Commonwealth, 216 Va. 412, 219 S.E.2d 845 (1975). At the federal level, the law precluding such testimony on Fifth Amendment grounds, at the time of the trial in November 1977, was not certain. Only subsequently, in Gibson v. Zahradnick, 581 F.2d 75 (4th Cir. 1978), did the Fourth Circuit establish the impropriety on Fifth Amendment grounds of testimony concerning damaging remarks of the accused during a psychiatric examination.[1]

One difficulty is presented by the case of Honeycutt v.

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1 That is not to say, however, that there were not indicia of things to come which antedated the trial of Smith. E.g., United States v. Albright, 388 F.2d 719 (4th Cir. 1968); Gibson v. Zahradnick, supra, at 78-79.

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Mahoney, 698 F.2d 213 (4th Cir. 1983). There it was held that a lawyer could not be found to have afforded ineffective assistance where in October 1973 he failed to object to imposition on the defendant of the burden of proof. That the imposition was, indeed, improper was finally established by the Supreme Court in Mullaney v. Wilbur, 421 U.S. 684 (1975). The Supreme Court's decision came down two years after the trial had taken place. However, both the district court on September 29, 1972 and the decision of the First Circuit Court of Appeals on February 14, 1973 had announced the same rule of law, subsequently adopted by the Supreme Court, before trial took place in October 1973.[2]

Rather than take such an approach here, however, especially inasmuch as the continued vitality of Honeycutt v. Mahoney has been rendered uncertain by the recent decision of Reed v. Ross, ____ U.S. ____, 82 L.Ed.2d 1, 52 U.S.L.W. 4905 (1984), we give weight to the consideration that we have before us a matter of life and death. The imminent execution of Smith serves as sufficient grounds to review the issue raised on the merits.[3] Since our determination on the merits is that Smith is not entitled to habeas corpus relief, we thereby, without displaying

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2 Wilbur v. Robbins, 349 F. Supp. 149 (S.D. Me. 1972); Wilbur v. Mullaney, 473 F.2d 943 (1st Cir. 1973).

3 See Hutchins v. Woodard, 730 F.2d 953, 959 (4th Cir. 1984).

substantial disregard for Wainwright v. Sykes, at least, avoid the nagging concern that one possibly meritorious grounds for avoiding the termination of Smith's life went unconsidered. Cf. Carrier v. Hutto, 724 F.2d 396 (4th Cir. 1983), holding that ignorance or oversight leading to the failure to raise a point on behalf of a criminal defendant may constitute cause sufficient to excuse failure to make a contemporaneous objection.[4]

On the merits, we immediately come up against the consideration that the jury's verdict recommending a death sentence was supported by two separate and distinct grounds of aggravation: (a) dangerousness (i.e., violence) and (b) vileness.[5] The asserted errors of constitutional dimension relating to the admission of psychiatric testimony were in testimony directed to

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4 At the same time, we feel it only fair to counsel who represented Smith to point out that the question is very clouded as to whether the representation he afforded his client was, in fact, ineffective or that any prejudice resulted. See Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052 (1984).

5 In the jury's verdict, the chameleon word "or" separates the finding of "probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society" from "his conduct in committing the offense is outrageously or wantonly vile." Any possible ambiguity is removed for us, however, by the determination of the Supreme Court of Virginia that "[t]he written verdict recited a finding of both aggravating circumstances." Smith v. Commonwealth, 219 Va. 455, 481, 248 S.E.2d 135, 151 (1978). Cf. Briley v. Bass, 750 F.2d 1238 (4th Cir. 1984) where "shall" from the context was read as "may." Similarly, the context removes any doubt that "or" meant, and was understood to mean, "and."

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the question of "dangerousness."[6] The evidence presented to the jury supporting a showing of "vileness" was unchallenged. The testimony in the guilt phase of the case amply provided a basis for a decision that the crime was vile.[7] Having met the victim on a beach, Smith paused to help remove briars from her feet. The appearance of kindness immediately dissipated when Smith grasped the victim's arm, took her to a wooded area, produced a knife, and told her to undress. He then forced her to have intercourse and, following that, choked her, dragged her into the water, submerged her head, stabbed her, and left the dead victim lying where she fell. The immediate cause of death was drowning, although the testimony indicated that stab wounds and strangulation also could have been responsible.

This court recently decided in Briley v. Bass, 742 F.2d 155, 165 (4th Cir. 1984), that any one aggravating circumstance deemed sufficient by the jury suffices:

> [S]ince the jury returned a verdict finding the death sentence warranted under both the "vileness" and the "dangerousness" standard, it is of no importance whether the instruction on "vileness" was correct so long as the instruction on "dangerousness" was correct, provided, of course, the verdict of the jury was unanimous on the "dangerousness

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6 The psychiatrist testified that Smith volunteered information that at some time prior to the incident for which he here stood convicted he assaulted a girl on a school bus.

7 In his instruction, the trial judge defined vile as torture, depravity of mind or aggravated battery to the victim.

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ground."

Similarly, the Supreme Court in Yant v. Stephens, 462 U.S. 862, 884 (1983) stated that

> [A] death penalty supported by at least one valid aggravating circumstance need not be set aside . . . simply because another aggravated circumstance is "invalid" in the sense that it is insufficient itself to support the death penalty.

The effort is also made to depict Smith's trial counsel as ineffective for failure, having once elicited testimony that Smith was a sociopathic personality, subject to sexual deviation, to explore with two psychiatrists who testified the possibility that Smith suffered from a potentially mitigating mental incapacity. First, inquiry into the area meant resort to a double-edged sword, requiring the application of professional judgment whether to pursue a subject that already had proved unproductive. Second, counsel's professional wisdom in deciding not to do so was borne out because both psychiatrists have (at the state habeas corpus hearing) indicated that, had they been asked an opinion as to whether Smith suffered from a potentially mitigating mental incapacity, the answer in each case would have been negative.

Finally Smith's constitutional challenge to jury instructions at the sentencing phase as having deprived him of his Eighth Amendment right to an individualized determination that death was the appropriate penalty, see Lockett v. Ohio, 438 U.S.

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596, 605 (1978), runs up against contrary authority which is controlling. The constitutionality of the instructions of which Smith complains has been upheld by Smith v. Commonwealth, 219 Va. 455, 480, 248 S.E.2d 135, 150 (Va. 1978). Furthermore, in considering a similar instruction under the same Virginia statute, this court recently ruled that the instruction was not constitutionally defective. Briley v. Bass, 750 F.2d 1238 (4th Cir. 1984). In the instant case, the language focussed on as allegedly erroneous is: "if you find that other mitigating circumstances do not justify a sentence of death, you may fix the defendant's punishment at life imprisonment."[8] Briley v. Bass concluded that inclusion in the jury charge of "or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment . . . at life imprisonment" left the instruction free of constitutional error.

The messages conveyed to the juries in the two cases are not substantially different in meaning. The refutation of the appellant's contention in Briley v. Bass dictates the same result here. The use in the instant case of "may" instead of "shall" does not overcome the consideration that reading the

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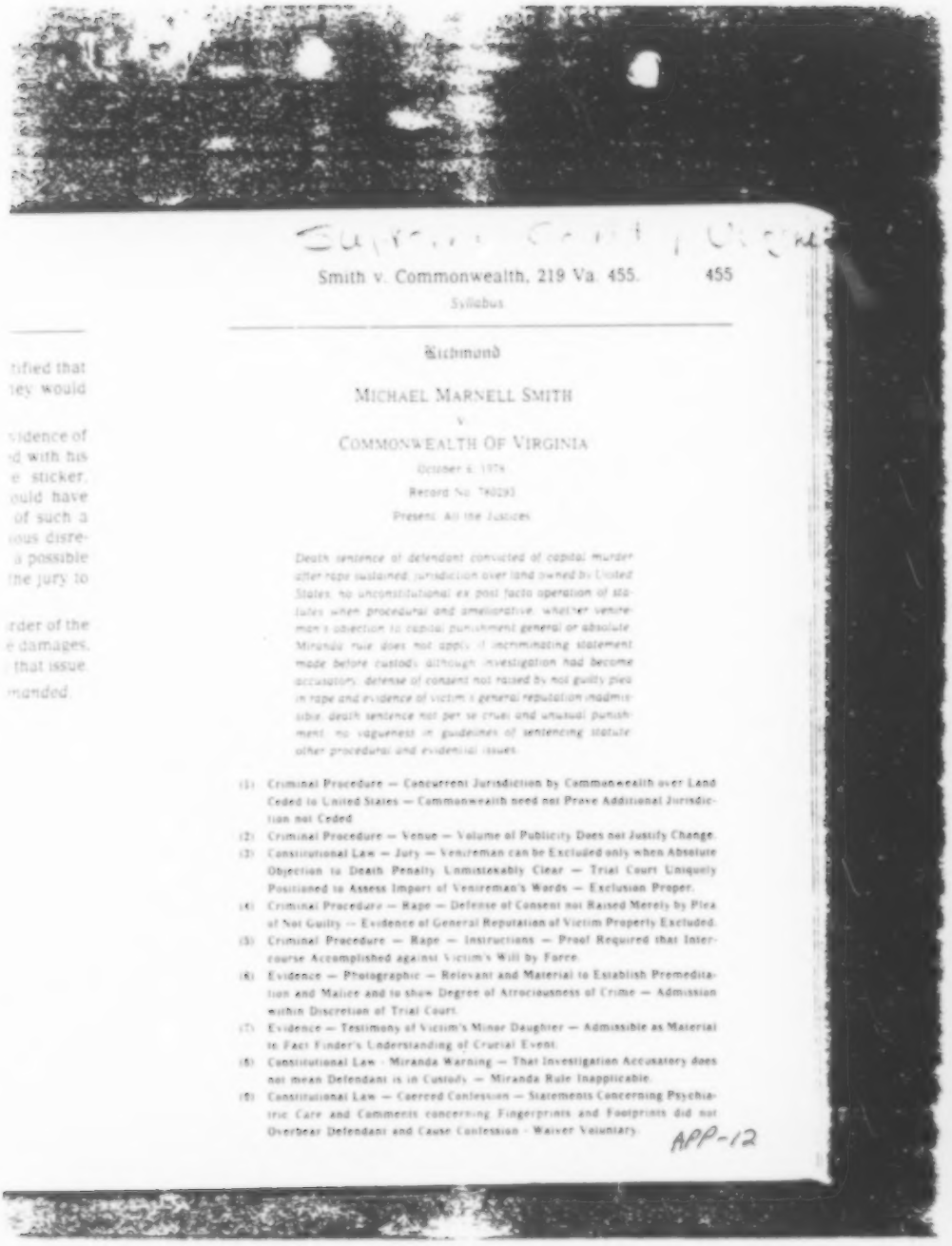
8 A related instruction read: "that when determining the punishment to be imposed . . . you shall consider . . . any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to the following . . . ."

instructions as a whole makes it altogether apparent that a finding that other mitigating circumstances did not justify a sentence of death necessitated rejection of the death penalty. Just as consideration of all the circumstances in Briley v. Bass converted "shall" to "may" in the statement "you shall fix the punishment of the defendant at death," so here "may" should be read as "shall."

Accordingly, we conclude that the action of the district court in dismissing the petition for a writ of habeas corpus should be, and it hereby is, affirmed.

Since execution is fixed for May 15, 1985, we grant a stay for a period of twenty-one (21) days from the filing of this opinion to permit the petitioner to apply to the Supreme Court or a Justice thereof for a further stay.

AFFIRMED.



Supreme Court of Virginia

Syllabus

Richmond

MICHAEL MARNELL SMITH

v.

COMMONWEALTH OF VIRGINIA

October 6, 1978

Record No. 780293

Present: All the Justices

Death sentence of defendant convicted of capital murder after rape sustained; jurisdiction over land owned by United States; no unconstitutional ex post facto operation of statutes when procedural and ameliorative; whether veniremen's objection to capital punishment general or absolute; Miranda rule does not apply if incriminating statement made before custody although investigation had become accusatory; defense of consent not raised by not guilty plea in rape and evidence of victim's general reputation inadmissible; death sentence not per se cruel and unusual punishment; no vagueness in guidelines of sentencing statute; other procedural and evidential issues.

(1) Criminal Procedure — Concurrent Jurisdiction by Commonwealth over Land Ceded to United States — Commonwealth need not Prove Additional Jurisdiction not Ceded.

(2) Criminal Procedure — Venue — Volume of Publicity Does not Justify Change.

(3) Constitutional Law — Jury — Venireman can be Excluded only when Absolute Objection to Death Penalty Unmistakably Clear — Trial Court Uniquely Positioned to Assess Import of Venireman's Words — Exclusion Proper.

(4) Criminal Procedure — Rape — Defense of Consent not Raised Merely by Plea of Not Guilty — Evidence of General Reputation of Victim Properly Excluded.

(5) Criminal Procedure — Rape — Instructions — Proof Required that Intercourse Accomplished against Victim's Will by Force.

(6) Evidence — Photographic — Relevant and Material to Establish Premeditation and Malice and to show Degree of Atrociousness of Crime — Admission within Discretion of Trial Court.

(7) Evidence — Testimony of Victim's Minor Daughter — Admissible as Material to Fact Finder's Understanding of Crucial Event.

(8) Constitutional Law - Miranda Warning — That Investigation Accusatory does not mean Defendant is in Custody — Miranda Rule Inapplicable.

(9) Constitutional Law — Coerced Confession — Statements Concerning Psychiatric Care and Comments concerning Fingerprints and Footprints did not Overbear Defendant and Cause Confession - Waiver Voluntary.

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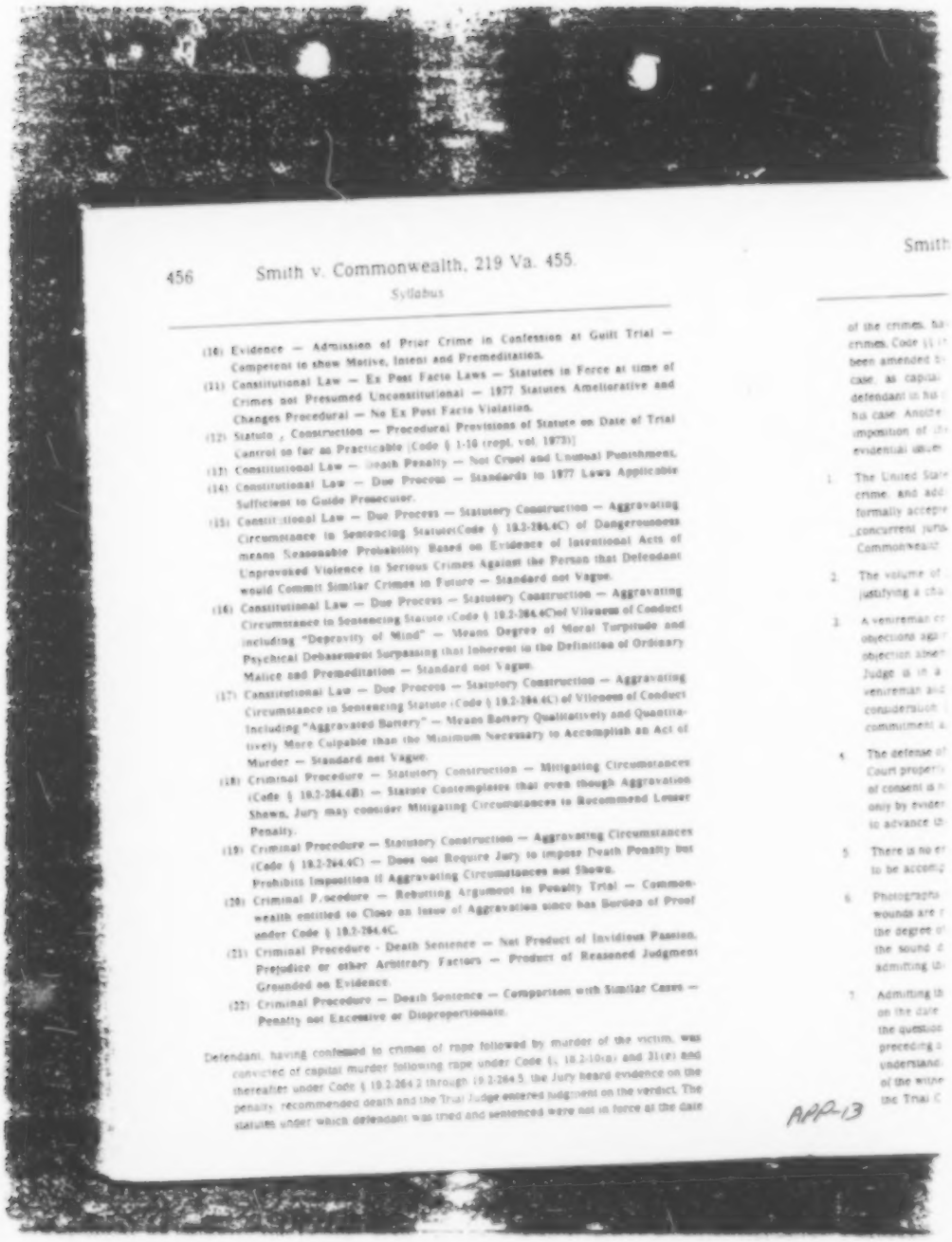

Syllabus

(10) Evidence — Admission of Prior Crime in Confession at Guilt Trial — Competent to show Motive, Intent and Premeditation.

(11) Constitutional Law — Ex Post Facto Laws — Statutes in Force at time of Crimes not Presumed Unconstitutional — 1977 Statutes Ameliorative and Changes Procedural — No Ex Post Facto Violation.

(12) Statute , Construction — Procedural Provisions of Statute on Date of Trial Control so far as Practicable (Code § 1-16 (repl. vol. 1973))

(13) Constitutional Law — Death Penalty — Not Cruel and Unusual Punishment.

(14) Constitutional Law — Due Process — Standards in 1977 Laws Applicable Sufficient to Guide Prosecutor.

(15) Constitutional Law — Due Process — Statutory Construction — Aggravating Circumstance in Sentencing Statute(Code § 19.2-264.4C) of Dangerousness means Reasonable Probability Based on Evidence of Intentional Acts of Unprovoked Violence in Serious Crimes Against the Person that Defendant would Commit Similar Crimes in Future — Standard not Vague.

(16) Constitutional Law — Due Process — Statutory Construction — Aggravating Circumstance in Sentencing Statute (Code § 19.2-264.4C)of Vileness of Conduct including "Depravity of Mind" — Means Degree of Moral Turpitude and Psychical Debasement Surpassing that Inherent in the Definition of Ordinary Malice and Premeditation — Standard not Vague.

(17) Constitutional Law — Due Process — Statutory Construction — Aggravating Circumstance in Sentencing Statute (Code § 19.2-264.4C) of Vileness of Conduct Including "Aggravated Battery" — Means Battery Qualitatively and Quantitatively More Culpable than the Minimum Necessary to Accomplish an Act of Murder — Standard not Vague.

(18) Criminal Procedure — Statutory Construction — Mitigating Circumstances (Code § 19.2-264.4B) — Statute Contemplates that even though Aggravation Shown, Jury may consider Mitigating Circumstances to Recommend Lesser Penalty.

(19) Criminal Procedure — Statutory Construction — Aggravating Circumstances (Code § 19.2-264.4C) — Does not Require Jury to impose Death Penalty but Prohibits Imposition if Aggravating Circumstances not Shown.

(20) Criminal Procedure — Rebutting Argument in Penalty Trial — Commonwealth entitled to Close on Issue of Aggravation since has Burden of Proof under Code § 19.2-264.4C.

(21) Criminal Procedure - Death Sentence — Not Product of Invidious Passion, Prejudice or other Arbitrary Factors — Product of Reasoned Judgment Grounded on Evidence.

(22) Criminal Procedure — Death Sentence — Comparison with Similar Cases — Penalty not Excessive or Disproportionate.

Defendant, having confessed to crimes of rape followed by murder of the victim, was convicted of capital murder following rape under Code §§ 18.2-10(a) and 31(e) and thereafter under Code § 19.2-264.2 through 19.2-264.5, the Jury heard evidence on the penalty, recommended death and the Trial Judge entered judgment on the verdict. The statutes under which defendant was tried and sentenced were not in force at the date

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of the crimes, having come into force on 1 July 1977. However, at the time of the crimes, Code §§ 18.2-10; 18.1-31 and 18.2-32 were in force, the latter two sections having been amended by Acts 1976, c.503 to classify murder subsequent to rape, as in this case, as capital murder with the sentence mandatory. One question raised by defendant in his appeal concerns the constitutionality of application of the 1977 laws to his case. Another concerns alleged vagueness of standards in Code § 19.2-264.4C for imposition of the death sentence. Numerous other constitutional, procedural and evidential issues are presented.

1. The United States, having been ceded concurrent jurisdiction over the situs of the crime, and additional jurisdiction being relinquished only by a deed of cession, formally accepted by the United States, it is presumed that the Commonwealth has concurrent jurisdiction over the situs since to hold otherwise would require the Commonwealth to prove a negative.

2. The volume of publicity concerning a crime does not impel a finding of unfairness justifying a change of venue.

3. A venireman constitutionally may not be excluded from service on the jury for general objections against the death penalty and the Trial Judge should not assume absolute objection absent an unambiguous statement by the venireman. Nevertheless the Trial Judge is in a unique position to assess the meaning of words employed by the venireman and his finding on the issue of objection will not be disturbed unless upon consideration of the voir dire as a whole the Court can say that the venireman's commitment against the death penalty was "not unmistakenably clear".

4. The defense of consent not having been advanced to the indictment for rape, the Trial Court properly excluded evidence of the general reputation of the victim. The defense of consent is not advanced solely by a plea of not guilty. The defense can be advanced only by evidence adduced by one of the parties and the evidence here was insufficient to advance the defense of consent.

5. There is no error in an instruction requiring proof that intercourse with the victim had to be accomplished against her will by force.

6. Photographs depicting contusions about the victim's neck, abrasions and multiple stab wounds are relevant and material to establish premeditation and malice and to show the degree of atrociousness of the crime. Admitting photographs in evidence is within the sound discretion of the Trial Court and there was no abuse of discretion in admitting the photographs here.

7. Admitting the testimony of victim's minor daughter as to when she last saw her mother on the date of the crime is not reversible error. The testimony, while not relevant to the question of guilt, supplemented the testimonial narrative of the sequence of events preceding and following commission of the crime and was material to the fact finder's understanding of the events. With deference to the Trial Court's superior perspective of the witness and the impact of her testimony upon the jury the Court cannot say that the Trial Court committed reversible error in allowing the testimony.

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Syllabus

8. The Miranda Rule applies only when there is a custodial investigation. The fact that the investigation had focused upon the suspect and had become accusatory is not determinative of the question of custody. While the Trial Court was not bound to believe defendant's testimony that he said "I'm the one" before the Miranda warning was given, the statement, in any event, was not the product of a custodial investigation.

9. Neither the officers' statements about defendant's need for psychiatric help nor their comments about fingerprints and footprints overbore defendant's will and caused him to execute a waiver and make a confession which otherwise he would have withheld.

10. Defendant having confessed that his reason for killing his victim he raped was to silence his accuser and, having referred in his confession to his return to the penitentiary, this admission, while referring to his prior criminal record, is admissible in his guilt trial to show motive, intent and premeditation.

11. While the crimes were committed on 23 May 1977 and the statutes under which defendant was convicted went into force on 1 July 1977, the statutes in force at the time of the crimes establishing a mandatory death penalty were not presumptively unconstitutional under *Roberts v. Louisiana*, 428 U.S. 280 (1976) and *Woodson v. North Carolina*, 428 U.S. 242 (1976). The 1977 laws were ameliorative and procedural and there is no ex post facto violation. *Dobbert v. Florida*, 432 U.S. 282 (1977) followed.

12. Code § 1-16 (repl. vol. 1973) requiring that proceedings under a new statute "shall conform, so far as practicable, to the laws in force at the time of such proceedings" means that the procedural provisions of the statute in effect at the date of trial control so far as practicable. This was done in defendant's case.

13. The death penalty does not constitute per se cruel and unusual punishment.

14. The standards contained in Code § 19.2-264.4 for imposing the death penalty due to aggravating circumstances are not so vague that adequate standards are not supplied to guide the prosecutor in selecting which defendants will be prosecuted for capital offenses.

15. To establish dangerousness as an aggravating circumstance, the Commonwealth must prove beyond a reasonable doubt that there is a probability that defendant would commit criminal acts of violence such as would prove a continuing severe threat to society. This focuses the fact finder's attention on prior criminal conduct as the principal predicate for a prediction of future dangerousness. If defendant has been convicted previously of serious crimes against the person, these being committed by intentional acts of uncontrolled violence, there is a reasonable probability that he would commit similar crimes in the future. This probability fairly supports the conclusion that society would be faced with a continuing serious threat.

16. "Depravity of mind", as this relates to "vileness" described as an aggravating factor in Code § 19.2-264.4C, means a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation.

17. "Aggravated battery", as d
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Appeal from a juc
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Amicus Curiae: I
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Syllabus

17. "Aggravated battery", as this relates to "vileness" described as an aggravating factor in Code § 19.2-264.4C, means a battery which qualitatively and quantitatively is more culpable than the minimum necessary to accomplish an act of murder.

18. The Virginia statute, Code § 19.2-264.4B, provides a list of mitigating circumstances which the fact finder is required to consider in pari materia with aggravating circumstances but the list is illustrative and not exclusive.

19. While Commonwealth's instruction I is not artfully drawn, when read as a whole it fairly expounds the thrust of Code § 19.2-264.4C that the death penalty will not be imposed unless the Commonwealth proves one of two aggravating circumstances beyond a reasonable doubt. The statute does not require that upon such proof the jury must impose the extreme penalty but only that absent such proof it shall not do so. Such discretion in the sentencing authority is not constitutionally infirm.

20. Code § 19.2-264.4C, placing upon the Commonwealth the burden of proving aggravating circumstances beyond a reasonable doubt, the Virginia rule is that the party having the affirmative of the issue has the right to open and conclude the argument before the jury. Dean v. Commonwealth, 42 Va (1 Gratt.) 557 (1844) followed.

21. The sentence imposed was not the product of invidious passion, prejudice or other arbitrary factor but was the product of a reasoned judgment grounded on the evidence and in accordance with law and the Court should not commute the death sentence to life imprisonment.

22. This being the first case reviewed under the 1977 law, no records of cases involving the particular crime charged being available for comparison, in consideration of the record as a whole and to the extent the Court can make a meaningful comparison with other capital cases, the penalty imposed was not excessive or disproportionate.

Appeal from a judgment of the Circuit Court of the City of Williamsburg and County of James City. Hon. Russell M. Carneal, judge presiding.

Affirmed.

David F. Pugh (*James Updike; Stone, Bland & Wood*, on brief) for appellant.

James E. Kulp, Assistant Attorney General (*Marshall Coleman*, Attorney General, on brief) for appellee.

Amicus Curiae: Post-Conviction Assistance Project of the University of Virginia School of Law (*Richard J. Bonnie; John Petrila*, on brief) for appellant.

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POFF, J., delivered the opinion of the Court.

On November 2, 1977, Michael Marnell Smith was convicted by a jury of capital murder following rape. Code § § 18.2-10(a) and 31(e) (Cum. Supp. 1977). The next day, pursuant to the bifurcated trial proceedings prescribed by Code § § 19.2-264.2, -264.3, -264.4, -264.5 (Cum. Supp. 1977), the jury heard evidence on the question of penalty and recommended a sentence of death. A post-sentence report was filed and, following another hearing, the trial court affirmed the jury's recommendation and entered final judgment November 30, 1977. Defendant's appeal and automatic review of sentence were consolidated and accorded priority on the docket. Code § § 17-110.1, -110.2 (Cum. Supp. 1977). By leave of court, the Post-Conviction Assistance Project of the University of Virginia filed a brief *amicus curiae* in support of defendant's position.[1] This is the first capital case appealed under the current statutes.

The medical evidence showed that Mrs. Audrey Jean Weiler, whose body was found floating in the James River at a point near the Colonial Parkway within James City County, died on May 23, 1977 as the result of asphyxia, drowning, and multiple stab wounds.

Defendant signed a written statement admitting that he encountered decedent walking alone on the beach, displayed a knife, ordered her to disrobe, and engaged in sexual intercourse with her; that, fearing she "could send [him] back [to the penitentiary]", he "started choking her with both hands . . . until she went limp"; and that he then "dragged her out into the water a couple of feet", "held her head under the water . . . [until] she stopped moving", and "stabbed her in the back several times."

On brief, defendant poses multiple questions which we will address in five categories. The first category relates to pre-trial proceedings; the second to the guilt trial; the third to constitutional challenges to the statutory complex under which defendant was convicted and sentenced; the fourth to the penalty trial; and the fifth to the propriety of the penalty imposed.

[1] We will consider the arguments advanced by *amicus* in support of the errors assigned by defendant. Some of the issues raised by those arguments, however, were never raised in the court below, are not comprehended by the assignments of error, and are not addressed by defendant on appeal. Such issues will not be noticed by this Court. Rule 5:21.

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I. PRE-TRIAL PROCEEDINGS

A. Jurisdiction

[1] Defendant assigns error to the trial court's denial of his pre-trial motion to dismiss for lack of jurisdiction. Tacitly acknowledging that the crime was committed within the geographical boundaries of James City County, defendant argues that, since the land in question is owned by the United States, it was incumbent upon the Commonwealth to show that the United States did not have exclusive jurisdiction over crimes committed thereon. It is well settled, however, that the mere ownership of land by the United States does not divest a state of its jurisdiction over that land, and that the nature and extent of the federal jurisdiction is dependent upon the consent of the state. *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937); *accord*, *Waltrip* v. *Commonwealth*, 189 Va. 365, 53 S.E.2d 14 (1949). The United States was ceded *concurrent* jurisdiction by statute over crimes committed on land to which it holds title within the Commonwealth. Code § 7.1-21(1) (Repl. Vol. 1973).[1] Any additional jurisdiction over this land can be relinquished only if the Commonwealth executes a deed of cession, and the deed must be formally accepted by the United States. Code § 7.1-21 (Cum. Supp. 1978); 40 U.S.C.A. § 255 (1970). In light of the cession by statute, it is presumed that the Commonwealth retains concurrent jurisdiction over the area embracing the locus of the crime. To hold otherwise, would be to require the Commonwealth to prove the negative, *i.e.*, that the United States was not deeded and did not accept exclusive jurisdiction. Since defendant adduced no evidence to show the affirmative, the presumption prevails and the trial court's ruling on the motion to dismiss was proper.

B. Change of Venue

[2] In support of his motion for a change of venue, defendant introduced numerous newspaper clippings, transcripts of radio broadcasts, and affidavits to show that the news media had given extensive publicity to the details of the crime with which he was charged, to his earlier conviction of rape, and to the "outbreak of

[1] This paragraph of the statute was repealed by Acts 1976, c. 211, but, by the same enactment, a similar provision was incorporated in Code § 7.1-18.1 (Cum. Supp. 1978).

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rapes in the Williamsburg-college community." Conceding that a change of venue is within the sound discretion of the trial court, *Lewis v. Commonwealth*, 218 Va. 31, 34, 235 S.E.2d 320, 322 (1977), defendant contends that the publicity prejudiced his right to a fair trial and that the trial court abused its discretion.

Defendant does not dispute the factual accuracy of the publicity. Nor does he point to anything of record to indicate that a single juror seated at trial was unable to disregard the publicity and accord him a fair trial. The burden of defendant's complaint is that the sheer volume of publicity concerning so heinous a crime, committed by a prior offender against a member of a family prominent in the community, compels a finding of unfairness. We disagree.

> Petitioner's argument that the extensive coverage by the media denied him a fair trial rests almost entirely upon the quantum of publicity which the events received. He has directed us to no specific portions of the record, in particular the *voir dire* examination of the jurors, which would require a finding of constitutional unfairness as to the method of jury selection or as to the character of the jurors actually selected. But . . . extensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial constitutionally unfair. Petitioner in this case has simply shown that the community was made well aware of the charges against him and asks us on that basis to presume unfairness of constitutional magnitude at his trial. This we will not do . . . .

Dobbert v. Florida, 432 U.S. 282, 303 (1977); *see also Greenfield v. Commonwealth*, 214 Va. 710, 716-17, 204 S.E.2d 414, 419-20 (1974).

We hold that defendant has failed to show that he could not or did not receive a fair trial in the jurisdiction in which he was convicted, and we find no abuse of judicial discretion in the trial court's ruling.

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391 U.S. at 522, n.

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C. Exclusion of Juror

[3] The trial court excluded Mrs. Piggott as a juror for cause related to her predisposition against capital punishment. Relevant portions of the *voir dire* are assembled at the foot of this opinion as Appendix B.

Veniremen may not constitutionally be excluded for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction", *Witherspoon* v. *Illinois*, 391 U.S. 510, 522 (1968), and exclusion of a single veniremen for such cause renders the death penalty constitutionally infirm. *Davis* v. *Georgia*, 429 U.S. 122, 123 (1976).

In support of his assignment of error to the trial court's ruling, defendant relies principally upon portions of two footnotes in *Witherspoon*:

> Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position.

391 U.S. at 516, n.9.

> The most that can be demanded of a venireman . . . is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.
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> . . . .
>
> [N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear . . . that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial . . .

391 U.S. at 522, n.21.

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The courts which have addressed the question do not agree what effect these two footnotes have upon the textual holding that "general objections" to capital punishment are not sufficient grounds to exclude a venireman for cause. *See* 39 ALR 3d 550 (1971). In our view, footnote 9 means that, absent an unambiguous statement of *absolute* objection, the trial judge cannot *assume* absolute objection. It does not mean that, simply because there may be some confusion and inconsistency in the statements that were made, the trial judge is foreclosed from determining from the *voir dire* at large whether a juror would "*automatically* vote against the imposition of capital punishment"

> [E]ven though a prospective juror's *voir dire* answers to questions concerning his beliefs as to capital punishment may be equivocal and not models of clarity, it is proper for the trial judge to excuse the juror for cause when a contextual consideration of the entire *voir dire* examination indicates that the juror could not vote for a verdict which would result in the imposition of the death penalty.

State v. Simmons, 286 N.C. 681, 688-89, 213 S.E.2d 280, 286 (1975), *vacated on other grounds*, 428 U.S. 903 (1976).

While footnote 9 is merely a comment parenthetical to the *Witherspoon* Court's recitation of the proceedings in the trial court, footnote 21 is keyed to and is a corollary of the textual holding. Under the holding and corollary read together, "general objections" to capital punishment are not constitutionally sufficient to justify the exclusion of a juror for cause; nothing less than an absolute objecton, *i.e.*, an irrevocable commitment to vote against the death penalty, will suffice.

Whether an exclusion is justified under the *Witherspoon* test is a mixed question of law and fact. Stated differently, the question whether the veniremen should be excluded turns upon the question whether, in fact, he is "irrevocably committed". In order to apply the rule of law, the trial court must first decide the factual question. As fact-finder, the trial court must weigh the meaning of the answers given in light of the phrasing of the questions posed, the inflections, tone, and tenor of the dialogue, and the general

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demeanor of the prospective juror. We are aware that, while the words employed may, when transcribed and read in retrospect, appear ambivalent, the judge who heard them uttered was uniquely positioned to assess their ultimate import. Accordingly, his finding on this question of fact will not be disturbed on appeal unless, upon consideration of the *voir dire* as a whole, we can say that the venireman's commitment against the death penalty was not "unmistakably clear".

The record of the *voir dire* shows that, in response to several questions patently phrased to elicit such a response, Mrs. Piggott agreed that capital punishment might "possibly" be appropriate in some cases. At least six times, however, she stated positively, and with no ambiguity, equivocation, or reservation whatsoever, that she could never, under any circumstances, vote to impose the death penalty. In reply to the last two questions put to her, she acknowledged that, if defendant should be convicted, she would vote for a "lifetime" penalty and that she was "absolutely against the death penalty".

In argument following the *voir dire*, counsel agreed that the test for exclusion was not whether Mrs. Piggott was "against the death penalty", but rather whether she was "absolutely against the death penalty". Noting the inconsistency in some of the responses to questions phrased by respective counsel, the trial court concluded that "life is all she'd ever give" and discharged her from the jury panel. We cannot say that this finding of fact was not "unmistakably clear", and we hold that the ruling grounded upon that finding did not contravene the principles announced in *Witherspoon* and its progeny.

II. THE GUILT TRIAL

A. Reputation Evidence

[4] Rape was an essential element of the crime of capital murder charged in the indictment. Code § 18.2-31(e). "[W]here consent is advanced as a defense to a charge of rape, the previous unchaste character of the prosecutrix may be shown by proof of general reputation." *Wynne v. Commonwealth*, 216 Va. 355, 356, 218 S.E.2d 445, 446 (1975). The trial court refused to permit such evidence on the ground that the defense of consent had not been advanced.

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As defendant says, once the defense is advanced, the issue of consent vel non becomes a jury question. But whether evidence relevant thereto is admissible is an evidentiary question. That issue depends upon whether the defense of consent has been advanced.

We do not agree that the defense is advanced solely by a plea of not guilty. That plea could be grounded upon defendant's belief that the Commonwealth is unable to prove identification, opportunity, or the physical elements of carnal knowledge. The defense of consent can be "advanced" within the meaning of the rule in *Wynn* only by evidence adduced by one of the parties. Whether the evidence is sufficient for that purpose necessarily is a question of law.

Here, the only evidence relevant to that question was defendant's own account of how the crime was committed. On appeal, defendant emphasizes certain circumstances as described in his confession: he met the decedent on a deserted beach; she joined him in friendly conversation; she permitted him to remove briars from her bare feet; she walked with him to a wooded area; she removed her own clothes and a tampon; and she made no attempt to escape while he affixed a contraceptive device. In light of the absence of evidence of a struggle or "defensive wounds", defendant says, this evidence was sufficient to advance the defense of consent.

In making its determination on this question, the trial court was not confined to isolated excerpts of the confession. According to other portions of the confession, when the decedent "started to walk toward her car and said 'I'm going' ", defendant put his "right arm around her waist" and told her, "come on, go with me"; she "was not too willing at first, so [he] pulled on her" and, when she asked him several times, "where are we going", he told her to "just keep on walking"; when they reached the wooded area, he "pulled a knife" and "told her to take her clothes off"; she then said, "please don't do this, I've got two kids at home, you don't need me", and telling her, "I've got to have you", defendant "got on top of her and had sexual relations with her".

The absence of evidence of a struggle or defensive wounds was largely irrelevant to the question before the trial court, for a

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"woman is not required to resist to the utmost of her physical strength if she reasonably believes that resistance would be useless and result in serious bodily injury to her." *Barnett* v. *Commonwealth*, 216 Va. 200, 202, 217 S.E.2d 828, 830 (1975). Nowhere in his confession did defendant claim that the act of intercourse was consensual. Rather, he acknowledged that he applied force in taking her to the wooded area, that he threatened her with a knife, and that she protested his advances. We believe the only reasonable conclusion the evidence supports is that she submitted, not out of volition, but out of a state of fear, one which, given the brutal consequences which followed, was fully justified.

We hold, therefore, that the trial court correctly ruled as a matter of law that the defense of consent had not been advanced and that the evidence defendant proffered was inadmissible.

B. Instruction on Rape

[5] As tendered, defendant's Instruction "H" defining forcible rape required the Commonwealth to prove that the act of intercourse was accomplished "by force and violence". Code § 18.2-61 does not require the Commonwealth to prove violence. Before granting the instruction, the trial court amended the language to require proof that intercourse with the decedent was accomplished "against her will, by force". The amendment accords precisely with the statutory definition, and we find no error in the trial court's action.

C. Photographs

[6] Defendant charges that, since photographs of the victim's body "were not necessary to identify the victim", they were merely inflammatory and, hence, inadmissible.

The admissibility of photographs is a matter within the sound discretion of the trial court. *Inge* v. *Commonwealth*, 217 Va. 360, 364, 228 S.E.2d 563, 566 (1976). There is no abuse of discretion in admitting photographs which are "relevant and material to establish premeditation and malice and to show the degree of atrociousness of the crime." *Brown* v. *Commonwealth*, 212 Va. 515, 519, 184 S.E.2d 786, 789 (1971).

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We are of the opinion that the photographs depicting contusions about the victim's neck, abrasions on her back, and multiple stab wounds in her body were relevant and material for the purposes approved in Brown and that they were no more inflammatory than the medical testimony detailing the results of the autopsy.

D. Testimony of Victim's Daughter

[7] The crime occurred at "approximately 1:45 or 2:00 p.m." on May 23, 1977. Heather Weiler, the victim's young daughter, testified that she last saw her mother at 8:00 a.m. that morning. One witness saw Mrs. Weiler alive at 10:30 a.m. and another at noon. Other witnesses described events late that afternoon leading to the discovery of the victim's body and other physical evidence.

Conceding that "the admissibility of evidence is within the sound discretion of the trial court", defendant contends that, since Heather "had no personal knowledge of the offense", her testimony "served only to inflame the jury" and its admission constituted an abuse of discretion.

As we read Heather's testimony, it did nothing more than supplement the testimonial narrative of the sequence of events preceding and following the commission of the crime. Such background events, though not directly relevant to the question of guilt, are material to the fact-finder's understanding of the crucial event, and for that purpose courts allow considerable leeway in the testimonial narrative. *See* McCormick, *Evidence*, (2d ed. 1972) § 185, p. 434.

We are of opinion that Heather's testimony was not, in the due process connotation of the word, inflammatory. None of her language was inflammatory *per se*. Given the fact the jury was already aware that the decedent was the mother of two young children, it is unlikely that Heather's appearance in the courtroom was inflammatory. The record does not disclose, and defendant does not argue, that Heather's conduct or demeanor during her brief testimony was maudlin, vengeful, or otherwise emotional. Hence, giving due deference to the trial court's superior perspective of the witness and the impact of her testimony on the jury, we cannot say that the trial court committed reversible error in allowing her testimony.

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E. Competency of Confession

(1) *Miranda*

[8] Defendant and his brother Howard lived on a farm near the scene of the crime. Officer Dunford, who was aware of defendant's prior conviction of rape, and Officers Gunson and Cumbee went to the farm and asked Howard if they could talk with defendant. Defendant was not there but, in response to Howard's telephone call, arrived a short time later. Standing in a hallway just inside the front door of the Smith home, the officers questioned defendant as he sat on the short staircase leading to the kitchen. They told him they were investigating the Weiler murder and asked him if he "had done this thing". Without any foundation in fact, Dunford suggested that defendant's fingerprints and footprints had been found at the scene of the crime. Later, while Dunford was in the kitchen talking with Howard, Gunson told defendant he believed he was guilty and urged him to confess and ease his conscience. The officers testified that, during the course of the interrogation, which lasted for possibly 15 minutes, defendant made no inculpatory statements. "He sat on the step with his head bowed, looking at the floor and twirling the front of his hair with his forefingers", and, according to the officers, his only responses were, "I know you would have come to see me" and, "Do you think a lawyer could help me?" At that point, Gunson held up his hand and told defendant not to say anything more. Cumbee read the *Miranda* warnings twice, asked whether defendant understood them, and defendant acknowledged that he did. Defendant then made an oral confession, showed the officers the scene of the crime, and pointed out the place he had discarded the murder knife. Later at the jail, defendant signed the written confession introduced in evidence.

Testifying solely in support of his motion to suppress, defendant said that, during the course of the initial interrogation, he had told the police, "I'm the one." This statement, he insisted, was made only after the investigation had "focused" upon him and had become "accusatory" and before the *Miranda* warnings were given. Therefore, he contends, he was under "custodial interrogation", his inculpatory statement was inadmissible under *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966), and his subsequent confession and all of the evidence

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derived therefrom was "tainted" under the rule in *Wong Sun v. United States*, 371 U.S. 471 (1963).

Miranda applies only where there is "custodial interrogation", *i.e.*, "questioning initiated by law-enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. The fact that the investigation had focused upon the suspect and had become accusatory is not determinative of the question of custody. *Jordan v. Commonwealth*, 216 Va. 768, 772, 222 S.E.2d 573, 577, at n.1 (1976); cf. *Beckwith v. United States*, 425 U.S. 341, 344-48 (1976). At the time defendant says he made the first incriminating statement, he had not been "deprived of his freedom in any significant way". He was not under arrest; no physical restraint of any kind had been imposed; and he was situated in a familiar, non-coercive environment which he had entered of his own accord. The trial court was not bound to believe defendant's testimony, but even if the inculpatory statement he said he made was made at the time he said, it was not the product of custodial interrogation, and we find no error in the trial court's ruling to that effect.

[9] We see no merit in defendant's further argument that "his waiver was not voluntary because . . . statements made by the three police officers could reasonably have been interpreted as offers of psychiatric treatment." It is true that the police had discussed defendant's need for psychiatric help, but they testified unanimously and positively that no offers or promises were made, and nothing defendant said in the suppression hearing contradicted that testimony. Nor do we believe that the officers' comments about the fingerprints and footprints overbore defendant's will and caused him to execute a waiver and make a confession he otherwise would have withheld. We conclude that defendant's waiver was voluntary and that the trial court did not err in admitting his confession.

(2) *Admission of Prior Crime*

[10] Defendant's confession included the following exchange:

Q. Why did you kill her?

A. All I could think about was going back to the penitentiary. I was afraid she could send me back.

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Evidence of defendant's prior criminal record adduced at the penalty trial was fully admissible. Code § 19.2-264.4B, C (Cum. Supp. 1977). Defendant contends, however, that the trial court should have excluded this portion of his confession at the guilt trial.

Generally, evidence of prior crimes is incompetent because it "confuses the issue before the jury, unfairly surprises the accused with a charge he is not prepared to meet, and tends to prejudice him in the minds of the jury". *Fleenor v. Commonwealth*, 200 Va. 270, 275, 105 S.E.2d 160, 163 (1958).

> There are exceptions, however, to this rule, as well established as the rule itself, and such evidence may be admitted to show motive, intent or guilty knowledge, or when it is connected with or leads up to the offense for which the accused is on trial.

Roy v. Commonwealth, 191 Va. 722, 726, 62 S.E.2d 902, 903 (1951).

Defendant freely admitted that his reason for killing the woman he had raped was to silence his accuser in order to avoid the consequences of his crime. We hold that his admission was fully competent to show motive, intent, and premeditaton.

III. CONSTITUTIONAL CHALLENGES TO THE STATUTORY COMPLEX

A. Preface

The pertinent portions of the statutory complex under which defendant was convicted and this review was docketed appear at the foot of this opinion as Appendix A. A premeditated killing following rape is one of the crimes denominated "capital murder", a class 1 felony punishable by death or imprisonment for life. When an indictment for a class 1 felony is tried by a jury, four separate proceedings must be conducted before a sentence of death can be executed. Three evidentiary hearings must be conducted. In the first, the jury must determine the issue of guilt or innocence and may convict the defendant of the crime charged or a lesser-included offense. If the defendant is convicted of a class 1 felony, there must be a second trial by the same jury to determine the issue whether the penalty should be death or imprisonment for

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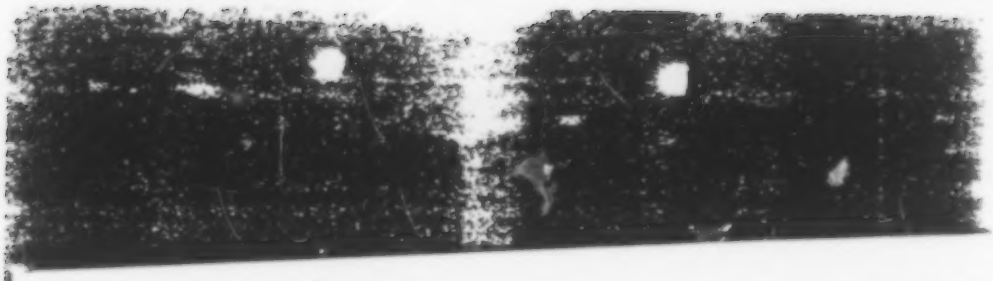

life. Bearing upon that determination, the jury may hear evidence concerning circumstances surrounding the offense, the history and background of the accused, and facts in mitigation of the offense. For illustrative purposes and not by way of limitation, five mitigating circumstances are expressly listed.

The jury may not recommend the death penalty unless the Commonwealth establishes one of two factors in aggravation of the offense. The Commonwealth must prove beyond a reasonable doubt either that there is a "probability" that the defendant would "commit criminal acts of violence that would constitute a continuing serious threat to society", or that his conduct in committing the crime was "outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or an aggravated battery to the victim." Code § 19.2-264.2. It is clear from the statutory context that, even when the Commonwealth establishes either or both aggravating circumstances, the jury is at liberty, in consideration of circumstances in mitigation, to recommend a sentence of imprisonment for life.

The penalty verdict must be in writing in one of two prescribed forms - one for a life sentence and the other for a death sentence. The latter contains a recitation of a finding of either "dangerousness" or "vileness" and a statement that the jury has considered evidence in mitigation of the offense. If the jury is unable to agree upon the penalty, the trial court is required to impose a sentence of imprisonment for life.

When the jury recommends the death penalty, the trial court must direct a probation officer to investigate the history of the defendant and other relevant facts and make a report to the trial court in accordance with the provisions of Code § 19.2-299. Under that statute, a copy of the report must be made available to the defendant at least five days before it is presented in open court and the defendant is guaranteed the right to cross-examine the investigating officer and the right "to present any additional facts bearing upon the matter which he may desire to present."

At the conclusion of this third hearing, if the trial court determines that the death penalty is not "appropriate and just", it may set aside the sentence of death and impose a life sentence.

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If the trial court affirms the death sentence, the defendant is entitled to an appellate review of the sentence as a matter of right, and the review is accorded priority on our docket. In the course of this fourth proceeding, this Court is directed to make two determinations, viz., whether the sentence was imposed under the influence of passion, prejudice, or other arbitrary factor, and whether, considering similar cases, the penalty is excessive or disproportionate. Having made these determinations, this Court may affirm the death penalty or commute it to life imprisonment.

To this statutory complex, defendant poses a two-fold challenge. First, he maintains that, as applied to his case, it offends the *ex post facto* clauses of the federal and state constitutions, U.S. Const. art. 1, § 10, and Va. Const. art. 1, § 9. Second, he contends that the statutory scheme is facially unconstitutional under the Eighth and Fourteenth Amendments.

Initially, we will summarize relevant developments in statutory and case law following the watershed decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972). *Furman* held that a statutory system which permits unbridled discretion in the process of imposing the death penalty violates the Eighth and Fourteenth Amendments. Responding to *Furman* in 1975, the General Assembly enacted new statutes eliminating sentencing discretion by making the death penalty mandatory upon conviction of selected offenses. Acts 1975, cc. 14, 15; Code § § 18.2-1, *et seq.* (Repl. Vol. 1975).

Thereafter, in 1976 the United States Supreme Court decided five cases attacking the constitutionality of death penalty statutes. In *Roberts* v. *Louisiana*, 428 U.S. 325 (1976), and *Woodson* v. *North Carolina*, 428 U.S. 280 (1976), mandatory death sentences were declared to be a constitutionally impermissible response to *Furman*. In *Jurek* v. *Texas*, 428 U.S. 262 (1976), *Proffitt* v. *Florida*, 428 U.S. 242 (1976), and *Gregg* v. *Georgia*, 428 U.S. 153 (1976), the Court decided that *Furman* did not require that all sentencing discretion be eliminated if the statutory system provides adequate standards to guide the exercise of that discretion.

In 1977, following the pattern approved in *Jurek*, the General Assembly enacted the statutory complex *sub judice*.

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B. As Applied Constitutionality

The crime at bar was committed May 23, 1977. The statutes under which defendant was convicted did not take effect until July 1, 1977. Defendant argues that *Roberts* and *Woodson* rendered the mandatory death provisions of Title 18.2 as enacted in 1975 (hereinafter, the 1975 law) "presumptively unconstitutional" and that, on the date of the crime of which he was convicted, the death penalty could not be imposed in Virginia; that Title 18.2 as enacted in 1977 (hereinafter, the 1977 law) was not ameliorative because it increased the potential penalty; and that the application of the more onerous 1977 law to a crime committed before it became effective thus violated the *ex post facto* clauses.

Manifestly, the alternative penalty provisions of the 1977 law were less onerous than the mandatory penalty provision of the 1975 law, and we do not agree that the 1975 law was "presumptively unconstitutional" at the time this crime was committed. In *Lewis* v. *Commonwealth*, 218 Va. 31, 235 S.E.2d 320 (1977), the defendant argued that *Roberts* and *Woodson* had invalidated the provisions of Code § 53-291 which prescribed a mandatory death penalty for the killing by an inmate of an employee of a prison. Noting that we had upheld the constitutionality of that statute in *Washington* v. *Commonwealth*, 216 Va. 185, 217 S.E.2d 815 (1975), and *Jefferson* v. *Commonwealth*, 214 Va. 747, 204 S.E.2d 256 (1974), we held that, until we had formally adjudicated a constitutional challenge, the statute "stand[s], at least presumptively, valid and enforceable." *Lewis*, 218 Va. at 38, 235 S.E.2d at 324.

The United States Supreme Court reached a similar conclusion from a comparable predicate in *Dobbert* v. *Florida*, 432 U.S. 282 (1977). Dobbert's crimes antedated the June 22, 1972 decision in *Furman*. The month following that decision, the Florida Supreme Court held that *Furman* invalidated the State's death penalty statutes. *Donaldson* v. *Sack*, 265 So.2d 499 (Fla. 1972). Later that year, Florida enacted the new statutes under which Dobbert was convicted. Dobbert claimed that there was no "valid" death penalty "in effect" on the date of his crime and that the application of the new statutes to his case increased the penalty and violated the *ex post facto* clause. Rejecting that argument, the Court said:

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> Whether or not the old statute would, in the future, withstand constitutional attack, it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers. The statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the State ascribed to the act of murder.

Dobbert, 432 U.S. at 297.

There can be no doubt about Virginia's historical view of the gravity of premeditated murder; the death penalty has been on our statute books since 1796. Given this ancient prologue and in light of the statute on the books on the date of the crime at bar which, as we have said, was presumptively valid and enforceable, we believe defendant had "fair warning" of the consequences of murder.

We conclude, therefore, that since the 1975 law was presumptively valid, the 1977 law was ameliorative. When the changes the subsequent law makes in the prior law are ameliorative, there is no *ex post facto* violation; the same is true when the changes, though not ameliorative, are merely procedural. *Dobbert*, 432 U.S. at 292, n.6. Clearly, the changes incorporated in the 1977 law were both ameliorative and procedural. Prompted by the teachings of *Jurek*, *Proffitt*, *Gregg*, *Roberts*, and *Woodson*, the General Assembly changed the 1975 law and established new procedures to be employed in the sentencing process to insure that the death penalty would not be imposed in an arbitrary or capricious manner. We hold, therefore, that the trial court committed no constitutional error in applying the 1977 law to defendant's case.

[12] Aside from this constitutional challenge, defendant invokes the provisions of Code § 1-16 (Repl. Vol. 1973) which read in pertinent part:

> No new law shall be construed to repeal a former law, as to any offense committed against the former law, or as to any . . . punishment incurred . . . or in any way whatever to affect any such offense or . . . punish-

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> ment so incurred . . . save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings . . . .

Citing *Ferguson* v. *Ferguson*, 169 Va. 77, 192 S.E. 774 (1937), defendant argues that, absent an expression of legislative intent to the contrary, all new statutes must be applied prospectively only. While it is true that the 1977 law is silent on the question, § 1-16 itself expressly provides that "proceedings" under a new statute "shall conform, so far as practicable, to the laws in force at the time of such proceedings." We construe this language to mean that procedural provisions of the statute in effect on the date of trial control the conduct of trial insofar as practicable. Defendant's trial was conducted in strict compliance with the new procedures in effect on the date of his trial, and we find no merit in his argument.[1]

C. Facial Constitutionality

[13-14] Defendant maintains that the 1977 law is facially unconstitutional under the Eighth and Fourteenth Amendments. He argues that the death penalty *per se* constitutes cruel and unusual punishment. Observing that *Furman*, *Roberts*, and *Woodson* interpreted the Eighth and Fourteenth Amendments to prohibit statutory schemes which vest "unbridled discretion" in the sentencing authority, he also argues that the Virginia statutes vest such discretion in the Commonwealth's Attorney; he reasons that, absent statutory standards to guide the prosecutor in selecting which defendants will be prosecuted for a capital offense and which for a non-capital offense, the 1977 law is facially arbitrary and capricious.

Both of these arguments were considered and rejected by the plurality of the United States Supreme Court in *Jurek*, *Proffitt*, and *Gregg* and by this Court in *Washington* v. *Commonwealth*, *supra*, and *Jefferson* v. *Commonwealth*, *supra*. For the reasons stated there, we decline defendant's invitation to disregard these precedents.

[1] On brief, defendant also argues that, as applied to a male, Code § 18.2-61 (Repl. Vol. 1975), which defines rape (one of the elements of the instant crime) as carnal knowledge of a female against her will and by force, constitutes a denial of equal protection of the laws. This question was not raised below, it was not the subject of an assignment of error, and it was not argued at bar. It will not, therefore, be noticed here. Rule 5:21.

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We are not persuaded by the contention that the statutory definitions of the two aggravating circumstances (see Appendix A) are so vague as to vest the sentencing authority with standardless sentencing power.

[15] The language defining the first aggravating circumstance, *i.e.*, the potential "dangerousness" of the defendant, is identical to that in the Texas statute upheld in *Jurek*. Rejecting a vagueness challenge to that language, the *Jurek* court said:

> It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. [footnotes omitted].

428 U.S. at 274-76.

To establish "dangerousness" the Commonwealth must prove beyond a reasonable doubt that there is a "probability" that the defendant would commit "criminal acts of violence" such as would pose a "continuing serious threat to society". We see no constitutional vagueness in that language.

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In our view, it is designed to focus the fact-finder's attention on prior criminal conduct as the principal predicate for a prediction of future "dangerousness".[4] If the defendant has been previously convicted of "criminal acts of violence", i.e., serious crimes against the person committed by intentional acts of unprovoked violence, there is a reasonable "probability", i.e., a likelihood substantially greater than a mere possibility, that he would commit similar crimes in the future. Such a probability fairly supports the conclusion that society would be faced with a "continuing serious threat".

[16-17] It also appears that the language defining the second aggravating circumstance, *i.e.*, the "vileness" of the defendant's conduct in committing the crime, is the same as that in the Georgia statute upheld in *Gregg*. Since any act of murder arguably involves a "depravity of mind" and an "aggravated battery to the victim", it is conceivable that the language defining the second aggravating circumstance could be tortured to mean that proof of an intentional killing is all the proof necessary to establish that circumstance. We regard such a construction as strained, unnatural, and manifestly contrary to legislative intent. The General Assembly was selective in choosing the types of intentional homicide it felt justified a potential sentence of death; clearly, then, it did not intend to sweep all grades of murder into the capital class.

Hence, we construe the words "depravity of mind" as used here to mean a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation. Contextually, we construe the words "aggravated battery" to mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder. *See Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976), *cert. denied*, 431 U.S. 933 (1977).[5] It seems to us that these are the only constructions rationally related to the commonly accepted connotation of the prefatory words, "outrageously or wantonly vile, horrible or inhuman".

[4] It should be noted that, while prior criminal conduct is the principal predicate, the statute provides a further predicate, viz., "the circumstances surrounding the commission of the offense of which [the defendant] is accused".

[5] *See also* Florida's construction of other language defining a similar aggravating circumstance in *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973), cited with approval in *Proffitt*, 428 U.S. at 255.

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[18] We note in passing that the Virginia statute contains a constitutional safeguard not explicitly articulated in the Texas statute. The 1977 law provides a list of mitigating circumstances which the fact-finder is required to consider *in pari materia* with aggravating circumstances. The list is illustrative and not exclusive; the statute expressly provides that facts in mitigation "may include, but shall not be limited to" the items codified, and that evidence may be adduced to show "any other facts in mitigation of the offense."[4] Code § 19.2-264.4B. Although the Texas statute was silent in this respect, it was found to be constitutionally sufficient on the grounds that the Texas Court of Criminal Appeals had "indicated that it will interpret . . . [the statute] so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show". *Jurek*, 428 U.S. at 272.

IV. THE PENALTY TRIAL

A. Commonwealth's Instruction "1"

[19] Defendant challenges Commonwealth's Instruction "1" because, he says, it fails to advise the jury that, even though it may find aggravating circumstances, the death penalty is not mandatory.

Code § 19.2-264.4C provides that the death penalty shall not be imposed unless the Commonwealth proves one of the two aggravating circumstances beyond a reasonable doubt. The statute does not require that, upon such proof, the jury *must* impose the extreme penalty but only that, absent such proof, it shall *not* do so. By requiring the jury to consider circumstances both in aggravation of and in mitigation of the offense, the statute clearly contemplates that, notwithstanding a showing of the former, the jury is at liberty in consideration of the latter to recommend the lesser penalty. Such discretion in the sentencing authority is not constitutionally infirm. "Nothing in any of our cases suggests that the decision to

[4] These provisions are clearly in accord with the mandate of *Roberts* and *Woodson* as interpreted in *Lockett v. Ohio*, 438 U.S. 586,604 (1978), where Chief Justice Burger for the Court states:

> [T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. [footnotes omitted].

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afford an individual defendant mercy violates the Constitution.'" *Gregg*, 428 U.S. at 199.

We agree that the instruction was not artfully drawn. Yet, we are of opinion that, read as a whole, it fairly expounds the thrust of the statute. Reciting the statutory command that the death penalty "shall not be imposed" absent a showing of aggravating circumstances, the instruction told the jury that it "may fix . . . punishment at death." What a jury "may" do it is at liberty not to do.

B. Rebuttal Argument by Commonwealth

[20] Defendant maintains that the trial court erred in permitting the Commonwealth to make a closing rebuttal during the penalty trial. That procedure, he says, "places undue emphasis on the aggravating circumstances".

The argument defendant makes was upheld in *People v. Bandhauer*, 66 Cal.2d 524, 530-31; 58 Cal. Rptr. 332, 336-37; 426 P.2d 900, 904-05, *cert. denied*, 389 U.S. 878 (1967), under the following rationale:

> The prosecutor's burden of proving guilt beyond a reasonable doubt at the trial on the issue of guilt justifies his closing the argument as well as opening it. At the trial on the issue of penalty, however, neither side has the burden of proving that one or the other penalty is the proper one in the case at hand, and there is no logical reason to favor one side over the other in argument.

But, as we have just noted, Code § 19.2-264.4C places upon the Commonwealth the burden of proving aggravating circumstances beyond a reasonable doubt. For more than a century, the rule in Virginia has been that "the party having the affirmative of the issue has the right to open and conclude the argument before the jury". *Doss v. Commonwealth*, 42 Va. (1 Gratt.) 557, 560-61 (1844). In light of the statutory command, we decline to change the rule here.

[1] We reject the thesis that, because the statutory alternative to the capital penalty is one which permits parole, the sentencing authority is constitutionally overbroad. Surely, mercy by parole is not unconstitutional.

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V. PROPRIETY OF THE SENTENCE

A. Product of Passion

[21] Defendant urges us to commute the death sentence to imprisonment for life. The sentence, he says, was the product of "passion, prejudice, or other arbitrary factors". He reasserts his arguments that the photographs of the victim's body and the testimony of her daughter inflamed the passions of the jury. The same was true, he contends, of the repetitious reading of his confession, once during opening argument, once during the evidentiary portion of the guilt trial, and once during the penalty trial.

At the penalty trial, the Commonwealth introduced evidence, *inter alia*, that defendant had been previously convicted of an earlier crime of forcible rape and psychiatric testimony concerning the possibility that he might commit future crimes of violence. Confining himself to cross-examination of the Commonwealth's witnesses, defendant offered no independent evidence of circumstances in mitigation of the offense. In argument, the only mitigating factors stressed were defendant's good behavior during incarceration, the prospect of rehabilitation, and the probability that, if sentenced to prison for life, defendant "would be in his sixties before he would even be eligible for parole". The written verdict recited a finding of both aggravating circumstances. Although the jury was told that it might yet impose the lesser penalty, it unanimously recommended a penalty of death. Based upon its consideration of "all of the evidence in the case, the report of the Probation Officer, the matters brought out on cross-examination of the Probation Officer and such additional facts as were presented by the defendant", the trial court entered final judgment confirming the penalty recommended by the jury.

We assume that the jurors were aroused by all they had heard and seen concerning conduct which they found to be "outrageously or wantonly vile, horrible or inhuman". And no doubt they were moved by the plight of a young daughter in the loss of her mother. Yet, we cannot say that, absent the trial incidents of which defendant complains, the jurors would have been less so or that they would have recommended a different penalty.

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We are, therefore, of opinion that the sentence imposed was not the product of invidious passion, prejudice, or other arbitrary factors but the product of a reasoned judgment grounded in the evidence and in accord with the law.

B. Excessiveness

[22] This Court is directed to determine whether the penalty imposed is "excessive or disproportionate to the penalty imposed in similar cases", and, in aid of that determination, we are empowered to "accumulate the records of all capital felony cases tried within such period of time as the court may determine."* Code § 17-110.1E (Cum. Supp. 1978).

On brief, defendant addresses this question in only two sentences. Although "there have been convictions for rape-murder in Virginia in recent years", he says, "no defendant has been subjected to the death penalty in Virginia in almost sixteen years."

Manifestly, since this is the first case to be reviewed under the 1977 law, no records of cases involving the particular crime charged in the indictment are available for comparison with the record here. Capital cases tried and reviewed under prior laws involved offenses definitionally different from the one at bar. Among a host of such cases, defendant cites none he considers fairly comparable to his case. Our own research has disclosed none in which a penalty less than death was imposed. On the other hand, we find that, of the 236 persons actually executed in the last seven decades, 232 had been convicted of murder or rape or murder in connection with rape. These figures do not, of course, include cases in which a death penalty initially imposed was set aside by the courts or commuted by executive clemency.

In consideration of the record as a whole and to the extent we can make a meaningful comparison with other capital cases decided in this Commonwealth, we hold that the penalty imposed in this case was not excessive or disproportionate. Finding no

* Pursuant to Code § 17-110.1E, we have this day entered an order directing the Clerk of this Court henceforth to segregate and accumulate the printed records and opinions in all class 1 felony cases, to maintain a current index of those cases, and to make the index, records, and opinions of this Court available for examination upon the request of any court of record in the Commonwealth or in the federal jurisdiction.

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reversible error in the court below, we will affirm the verdict of guilty and the sentence of death.

Affirmed.

APPENDIX A

The Statutory Complex (Cum. Supp. 1977)

§ 18.2-10. Punishment for conviction of felony. — The authorized punishments for conviction of a felony are:

(a) For Class 1 felonies, death, or imprisonment for life.

* * * *

§ 18.2-31. Capital murder defined; punishment. — The following offenses shall constitute capital murder, punishable as a Class 1 felony:

(e) The willful, deliberate and premeditated killing of a person during the commission of, or subsequent to, rape.

* * * *

§ 19.2-264.2. Conditions for imposition of death sentence. — In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

* * * *

§ 19.2-264.3. Procedure for trial by jury. — A. In any case in which the offense may be punishable by death which is tried before a jury the court shall first submit to the jury the issue of guilt or innocence of the defendant of the offense charged in the

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indictment, or any other offense supported by the evidence for which a lesser punishment is provided by law and the penalties therefor.

B. If the jury finds the defendant guilty of an offense for which the death penalty may not be imposed, it shall fix the punishment for such offense as provided by law.

C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty, which shall be fixed as is provided in § 19.2-264.4.

* * * *

§ 19.2-264.4. Sentence proceeding. — A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any Rule of Court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, or (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance or (iii) the victim was a participant in the defendant's conduct or consented to the act, or (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or (v) the age of the defendant at the time of the commission of the capital offense.

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C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. The verdict of the jury shall be in writing, and in one of the following forms:

(1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his past criminal record that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed _____ foreman"

or

(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed _____ foreman"

(E) In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.

* * * *

§ 19.2-264.5. Post sentence reports. — When the punishment of any person has been fixed at death, the court shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate upon the history of the defendant and any and all other relevant facts, to the end that the court may be fully

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advised as to whether the sentence of death is appropriate and just. Reports shall be made, presented and filed as provided in § 19.2-299. After consideraton of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life.

* * * *

§ 17-110.1. Review of death sentence. — A. A sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on the record by the Supreme Court.

B. The proceeding in the circuit court shall be transcribed as expeditiously as practicable, and the transcript filed forthwith upon transcription with the clerk of the circuit court, who shall within ten days after receipt of the transcript, compile the record as provided in Rule 5:14 and transmit it to the Supreme Court.

C. In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and

2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. In addition to the review and correction of errors in the trial of the case, with respect to review of the sentence of death, the court may:

1. Affirm the sentence of death; or

2. Commute the sentence of death to imprisonment for life.

E. The Supreme Court may accumulate the records of all capital felony cases tried within such period of time as the court may determine. The court shall consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive. Such records as are accumulated shall be made available to the circuit courts.

F. Sentence review shall be in addition to appeals, if taken, and review and appeal may be consolidated. The defendant and the Commonwealth shall have the right to submit briefs within time limits imposed by the court, either by rule or order, and to present oral argument.

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§ 17-110.2. Priority given to such review. — The Supreme Court shall, in setting its docket, give priority to the review of cases in which the sentence of death has been imposed over other cases pending in the Court.

APPENDIX B

Voir Dire of Mr. Piggott

[BY MR. PERSON, COMMONWEALTH'S ATTORNEY]

Q. And do you understand in the first hearing that the jury will determine guilt or innocence of the Defendant?

A. Right.

Q. And do you understand that in the second hearing, the second part of this trial, that the jury, if they find the Defendant guilty of capital murder, will be asked to fix his punishment at life imprisonment or death?

A. Yes.

Q. Now, do you have any religious or moral or conscientious scruples against giving somebody the death penalty in the proper case?

A. I would say yes.

Q. Yes. You couldn't give anybody the death penalty, could you?

A. No.

Q. All right. And in fact, no matter what the facts were in the case, you couldn't put somebody to death, could you?

A. No.

Q. Nor could you vote for somebody to die, could you?

A. No.

Q. All right. So you are absolutely against the death penalty, is that correct?

A. I think so.

[BY MR. WOOD, COUNSEL FOR DEFENDANT]

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Q. All right. Now, would the fact that you had to vote first of all on guilt or innocence initially, now before any sentence were imposed, what I am talking about just voting on one thing, that's guilt or innocence of the accused, would the fact that the person could either get life or death, would that influence your decision at all in voting for guilt or innocence?

A. No.

Q. It wouldn't influence you, is that correct?

A. It would not.

Q. Would the view that you hold about capital punishment compel you automatically solely on those views, would they compel you to vote not for the death penalty, or could you possibly vote for the death penalty?

A. Well, could you make that a little plainer. I didn't understand that too good.

Q. Okay. I assume from your answers, answering Mr. Person's questions, that you're somewhat opposed to the death sentence, is that correct?

A. Right.

Q. In the State of Virginia. All right. Would the views that you hold, that is your own personal feelings about the death penalty, would they compel you solely because of the views you hold about the death penalty, would they compel you, would that in other words, force you to vote for the death penalty, or could you possibly vote for the death penalty in a certain case depending on what the facts were, depending on what the evidence is in that particular case?

A. I guess I possibly could then, I guess. I don't know.

Q. Depending on what the facts are in any particular case, is that correct?

A. Yes.

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[BY MR. PERSON:]

Q. Mrs. Piggott, you understand now, and excuse me if I repeat myself because it's very important to get your answers correctly because this is the time when you can — you as a person can tell Judge Carneal that you don't agree with the law; that you don't agree with the death penalty in this case, no matter what the case is, that you don't agree with it and nothing will happen to you. This is one time you can do that and you can tell Judge Carneal that you don't agree with the death sentence under any circumstances because you just don't feel it's right, and nothing will happen. Now, is that the way you feel?

A. No, not exactly. But — I don't know. I don't like — you know — to hear of that but I guess something have to be done if you're wrong, I guess.

Q. Let me ask you this. To make myself perfectly clear, you understand that the first trial will be — the jury will determine whether the defendant is guilty or innocent, is that correct?

A. Right.

Q. Now, knowing that the Defendant might be given death, could you if the Commonwealth proves its case beyond a reasonable doubt and if it was a proper case, could you find the Defendant guilty, knowing that he might be given death later on, or would you have to find him not guilty?

A. Well, I guess if he's guilty, I'll have to.

Q. You could find him guilty, is that correct?

A. Yes.

Q. Now, once you found him guilty, there would be only two punishments.

A. Yes.

Q. One would be life imprisonment and the other would be death. All right.

A. Yes.

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Q. Now, if the Commonwealth proves its case beyond a reasonable doubt and it was a proper case, could you vote the death penalty for the Defendant?

A. I —

Q. Or would you have to give him life imprisonment?

A. I would say life.

Q. Life. All right. So no matter what — in the second half of the trial, after you found him guilty, in the second half of the trial, no matter what the Commonwealth evidence showed, and no matter what the law told you, you couldn't give a person death, is that correct? You'd have to give him life, is that correct?

A. Yes.

Q. So you are absolutely against the death penalty, is that correct?

A. Right.

Q. In any situation?

A. No.

Q. Is that correct?

A. Right.

[BY MR. WOOD:]

Q. Mrs. Piggott, you answered some questions for me before here, is that right?

A. Yes.

Q. Didn't you answer at that time that — when I asked you a question about whether or not you possibly could impose the death sentence in some case, depending on the facts of that case?

A. Yes.

Q. That in fact you said you possibly could, is that correct?

A. Yes.

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Q. Is that the way you feel, possibly you could. You wouldn't want to, but — but you possibly could?

A. Yes.

Q. So that your feelings are not absolute, is that correct?

A. Yes.

Q. That's correct?

A. Yes.

Q. You're not saying to Mr. Person and to the Judge that I don't care what kind of case it is, or how bad the case is, I absolutely could not impose it. You're saying you possibly could, is that correct?

A. Yes.

[BY MR. PERSON:]

Q. So you are saying no matter how difficult it might be and no matter how painful it might be, and no matter who might criticize you, that under certain facts and under certain circumstances, that you could in a proper case, if the Commonwealth proved its case beyond a reasonable doubt, and this is when you have the choice between life imprisonment and death —

A. Yes.

Q. Under those situations you could vote that the Defendant would get the death penalty, is that correct?

A. I thought I said lifetime.

Q. So you're absolutely against the death penalty, is that correct?

A. Yes.

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DOCTOR WENDELL PILE, called as a witness by the Commonwealth, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PERSON:

Q Will you state your name and occupation and profession, please?

A Doctor Wendell Pile; I'm a psychiatrist at Hampton, Virginia.

Q And how long have you been a psychiatrist, Doctor Pile?

A I have been a psychiatrist since 1976 -- 1946.

Q Could you briefly tell the ladies and gentlemen of the jury your background in regard to education?

A I'm a graduate of the University Illinois Medical School in 1945, received my psychiatric training at Perry Point University Hospital, Eastern State Hospital, in Virginia, and received my boards in psychiatry in 1952; been in private practice of psychiatry since 1952, and past Director of the Mental Hygiene Clinic in Newport News. Now Medical Director of Bayberry Psychiatric

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Hospital.

Q Now, pursuant to an order of this Court, did you conduct an examination of the Defendant, Michael Marnell Smith?

A I did.

Q Is he in the Courtroom?

A He is.

Q Will you point him out to the ladies and gentlemen of the jury?

A The gentleman to my left, over there (indicating).

COURT: Let the record show he pointed to the Defendant.

BY MR. PERSON:

Q Did you talk to him in Hampton, Virginia?

A I did.

Q Do you remember what date you talked to him?

A It was October the 1st.

Q Did he tell you anything about the girl on the school bus?

A He did.

Q What did he say about that?

A He said --

MR. PUGH: Your Honor, I have a motion, if your Honor please, with respect to the -- what further testimony the Doctor is going to --

COURT: All right. Take the jury out.

(At this time, the jury retired to the jury room.)

COURT: All right, sir.

MR. PUGH: Your Honor, we're going to object to any testimony made by Doctor Pile with respect to a case involving or an incident involving the Defendant at sometime prior to the offense for which he's charged.

COURT: Well, Mr. Pugh --

MR. PUGH: As well as the fact that -- I think that the Commonwealth has to lay the foundation as to what the Doctor instructed

Mr. Smith with respect to his rights to say anything to him.

COURT: I don't think the Doctor is an officer of the law; and certainly let me point out, first of all, Mr. Pugh, Doctor Pile was appointed at your suggestion to examine this man. You suggested Doctor Pile, as I recall it. Following your suggestion, I appointed him to examine this man.

MR. PUGH: That's not the question in issue.

COURT: If you will let me finish, Mr. Pugh, and I'll let you finish.

You, having done this, and Mr. Smith having talked to him, I don't believe that Doctor Pile has any duty to inform him that anything he may say to him may be used for or against him in a Court of Law, as a police

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officer does under the Miranda.

Secondly, as I interpret Section 19.2-22-64.4, it clearly reads "evidence which may be admissible, subject to the rules of evidence governing admissibility, may include tne circumstances surrounding the offense, the history and background of the defendant."

Now, how -- how is history and background obtained? The man writes his own history. Sometimes with his words and sometimes with his deeds, but he writes his own history. And whatever he says, whatever he says he did, that's one of the ways of knowing history. Certainly -- I think what he said to Doctor Pile is admissible.

What else do you want to say?

MR. PUGH: I don't have any further statement or

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comment on that. I just object.

COURT: Note --

MR. WOOD: I do have one brief matter in regards to another matter.

COURT: All right.

MR. WOOD: The Doctor -- has written a letter, as the Court knows, to the Court, of course, we got copies of it.

COURT: Yes sir.

MR. WOOD: And a comment was made in his letter in regards to any other previous rapes, and the comment that was made in his letter was that his lawyers had told him not to comment on anything like that.

MR. PERSON: I'm not going to --

MR. WOOD: Or words to that effect. I don't believe it would be proper for the Doctor to say that.

MR. PERSON: I'm not going to ask him that question.

COURT: I agree with you, Mr. Wood.

Any reference to what lawyers may have -- what he said with reference to what lawyers may have told him, Doctor Pile, would not be proper to tell to the jury.

MR. WOOD: Yes sir.

COURT: Your exception will be noted, Mr. Pugh.

(At this time, the jury returned to the Courtroom and resumed their seats in the jury box.)

(The Defendant was present, seated at counsel table.)

BY MR. PERSON:

Q Tell us what he told you, Doctor Pile.

A He explained that he was driving

a school bus. That he came close to assaulting a girl. He tore her clothes off, but then thought better of raping her, and did not do so.

MR. PERSON: That's all the questions I have.

COURT: All right. You may cross examine him, Mr. Pugh.

CROSS EXAMINATION

BY MR. PUGH:

Q Doctor Pile, you indicated -- you stated that you saw Michael Smith on October the 1st, is that correct?

A Right.

Q And how long a period of time did you converse with Michael Smith?

A I imagine about an hour. Usually my consultation is an hour.

Q Did you see him after that date?

A I did not.

MR. PUGH: Just a moment.

(At this time,

Mr. Pugh and Mr. Wood conferred.)

MR. GROSS (JUROR): When this incident that he described to the Doctor take place?

COURT: Did he advise you, Doctor, when it had taken place?

A While he was driving a school bus. I assume it was at a younger age, but I don't know the exact time.

BY MR. PUGH:

Q Doctor Pile, in your diagnosis, what was your diagnosis of Michael Smith?

A I felt he was - sociopathic personality, sexual deviation, rape.

Q What is that?

A A person who -- is also described as an antisocial personality. They're all sort of the same type of -- of personality disorder. The basically people who are unsocialized, and they're quite repeatedly in conflict with the Court. They don't seem to have any capability of -- of having loyalty to anybody, to any group or to any social values. Usually, they're rather irrespon-

sible. They seem to feel no guilt, and they don't seem to learn from either experience or punishment. They seem to particularly have no feelings or standards what's right and what's wrong.

Q Do they have compulsions to commit crimes, Doctor?

A They will comit crimes, but it need not be a compulsion. They just have no -- they want to do what they want to do, irrespective of what the laws of the land are. Basically, they do what they will do to get -- enjoyment.

Q Over what period of time, if a person has this antisocial personality, what period of time would a person develop this behavior? Is it a year or two years or --

A No, frequently you see this start when they're in adolescence, and -- it's something that -- develops around the time of puberty, usually, but you can see it come out at other times.

Q Would you categorize this as being an -- an emotional illness or sickness?

A It's a -- form of a -- personality disorder or an -- inadequate personality that has nothing to do with whether he knows the difference between right and wrong, for instance. He does. But it's a -- a person who

is not like, I assume, most of us here, but he -- it's a personality disorder.

Q Well, do we have that personality disorder, the typical person?

A The typical person does not, no.

Q It's not average?

A No, it's not.

Q What type of treatment is available for a person with this type of disorder?

A Well, this is the type of person who is usually seen in Courts on trial, and when they're adjudged to be not insane, to know what they're doing, they're usually treated as a criminal, and the Court takes care of the punishment.

Q Let me --

COURT: Let him finish now, Mr. Pugh.

A There are, of course, cases who, with a personality disturbance, they are, hopefully, they can be some help in changing a personality; and a person like this, an attempt is made with psychiatric help and maximum security type pr ion or hospital, to see if something can be done.

BY MR. PUGH:

Q Would be your recommendation for

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treatment --

MR. PERSON: Judge, let me take something up outside.

COURT: Ladies and gentlemen.

(At this time, the jury then retired to the jury room.)

MR. PERSON: Judge, the ultimate issue in this whole case is life or death and I would object to -- to the -- Doctor Pile giving his opinion whether the man should be given life or given death.

COURT: Of course. Of course.

MR. PERSON: That's the reason. They asked him what his recommendation would be and I would assume that was the question he was eliciting.

MR. PUGH: I withdraw the question, Judge.

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COURT: All right.

(At this time, the jury returned to the Courtroom and resumed their seats in the jury box.)

(The Defendant was present, seated at counsel table.)

COURT: Any further questions?

MR. PUGH: Yes:

BY MR. PUGH:

Q Doctor, what causes a disorder of the type you diagnosed Mr. Smith had?

A I'm sure there are a lot of theories, what causes this type of condition, and -- I don't think there's any one that really knows. Like a lot of psychiatric conditions, we know the symptoms, and unfortunately we don't know the cause for a lot of them. And -- in this particular case, I would have no idea what the cause might be for his particular problem.

MR. PUGH: That's all I have.

COURT: Any further

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questions of the Doctor?

MR. PERSON: No sir.

COURT: Any further need for the Doctor?

MR. PERSON: No sir.

COURT: Doctor Pile, you may be excused.

MR. PERSON: Thank you, Doctor.

COURT: Who is next witness?

MR. PERSON: Doctor Dimitris.

- - -

DOCTOR JAMES C. DIMITRIS, called as a witness by the Commonwealth, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PERSON:

Q State your name, please, sir.

A James Christian Dimitris. The

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INSTRUCTION NO. 1

The Court instructs the jury that the penalty of death shall not be imposed unless you find that the Commonwealth has proven beyond a reasonable doubt that:

1. There is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he has been found guilty that he would commit criminal acts of violence that would constitute a continuing serious threat to society,

or

2. That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim;

You may fix his punishment at death.

If you find that the Commonwealth has failed to prove either (1) or (2) above beyond a reasonable doubt, or if you find that other mitigating circumstances do not justify a sentence of death, you may fix the defendant's punishment at life imprisonment.

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INSTRUCTION NO. A

The Court instructs the jury that when determining the punishment to be imposed for a conviction of capital murder, you shall consider the circumstances surrounding the offense, his history and back ground of defendant Michael Marnell Smith, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to the following: (i) the capital felony was committed while th. defendant was under the influence of extreme mental or emotional disturbance, or (ii) at the time of the commission of the capital felony, the capacity of defendant Michael Marnell Smith to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or (iii) the age of defendant Michael Marnell Smith at the time of the commission of the capital offense.

INSTRUCTION NO. B

The Court instructs the jury that even though you [redacted] beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he has been found guilty that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim, after considering mitigating circumstances you may fix his punishment at life imprisonment.

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APP-65 Refused

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF WILLIAMSBURG AND COUNTY OF JAMES CITY

MICHAEL MARNELL SMITH, Petitioner	)	FINDINGS OF FACT
V.	)	AND
EDWARD C. MORRIS, SUPT. MECKLENBURG CORRECTIONAL CENTER, Respondent	)	CONCLUSIONS OF LAW

On November 2, 1977, petitioner Michael Marnell Smith was convicted by a jury of capital murder following rape under Va. Code Ann. § 18.2-10(a) and -31(e) (Cum. Supp. 1977). On November 3, 1977, pursuant to the bifurcated capital trial proceedings prescribed by Va. Code Ann. § 19.2-264.2 et seq. (Cum. Supp. 1977) the jury recommended the sentence of death, which, after review, was imposed by this Court on November 30, 1977. The conviction and sentence were unsuccessfully appealed. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978); cert. denied, ___U.S.___, 99 S.Ct.2419, (1979). On June 22, 1979, petitioner filed a writ of habeas corpus with this Court, alleging ineffective assistance of counsel during his trial. For the reasons set forth below, the petition is denied.

As a predicate to his claims of inadequate assistance of counsel, petitioner urges this Court to adopt a standard of competency applicable to capital cases which is decidedly narrower than that applied to other criminal cases. While it is true, as petitioner asserts, that jury selection takes on great significance in a capital case, and that a separate evidentiary case must be prepared for the sentencing phase of the capital trial, the special tasks involved in such a case have been found to be within the competence required of counsel in other criminal

trials. Alderman v. State, 241 Ga. 496, 246 S.E.2d 642 (1978); Harvin v. State, 582 S.W.2d 794 (Cr. App. Tex. 1978). Noting that petitioner cites no holdings to the contrary, and finding no indication that special qualifications beyond those in normal criminal trials are required of counsel in the bifurcated capital trial, I conclude that the standards of competency applicable to other criminal cases also apply to the capital case.

Thus, it would appear that petitioner's claims rest on the standard set forth in Slayton v. Weinberger, 213 Va. 690, 194 S.E.2d 703 (1973), where incompetent representation of counsel was said to occur "only in those extreme instances where the representation is so transparently inadequate as to make a farce of the trial." Id. at 705. Petitioner, however, bases his claim on the standard in Marzullo v. Maryland, 561 F2d 540 (4th Cir. 1977), which states that inadequate representation results from conduct "so flagrant that a court could conclude that [such conduct] resulted from neglect or ignorance rather than from informed, professional deliberation." Id. at 544. Resolving any difficulties arising from differences in the language employed by the two courts above, I conclude that under the standards pronounced by either court, petitioner received adequate assistance of counsel.

I

Petitioner's first claim centers on the admissibility during the sentencing phase of the trial of certain statements he made during a pretrial psychiatric examination. On October 1, 1977, by order of this Court pursuant to petitioner's request for an

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evaluation by a psychiatrist of his own choosing, petitioner underwent a one-hour psychiatric examination by Dr. Wendell Pile. In a letter to this Court dated October 1, 1977, Dr. Pile described an account by petitioner of a previously undisclosed incident which occurred in his youth. The letter relates that petitioner, a school bus driver at the time, once tore the clothes off a girl, but on second thought, decided not to rape her. At the sentencing phase of the trial, petitioner's counsel objected to an attempt by the prosecution to elicit on direct examination this account by Dr. Pile on the grounds that during the examination Dr. Pile failed to inform petitioner that his statements could be used against him. This Court overruled, noting that Dr. Pile's examination occurred at petitioner's request.

Referring to the psychiatric examination itself, Dr. Pile, At the beginning of said examination, encouraged petitioner to make a full disclosure of the offense and any prior offenses. Petitioner advised Dr. Pile that his attorney had told him not to discuss the offense or any prior offenses in which he had been involved. Thereafter, Dr. Pile did not press petitioner for information, but during the interview petitioner told Dr. Pile of the incident on the bus as recited above.

Thus, the Court finds that petitioner was carefully advised by his attorney not to discuss the offense with anyone and also not to divulge anything about prior offenses, that petitioner was fully aware of this advice when he was examined by Dr. Pile and exhibited such knowledge when he advised Dr. Pile that his attorney had told him not to discuss any past offenses, and that petitioner voluntarily waived his right against self-incrimination.

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Turning now to the case law discussed by petitioner in support of his first claim, petitioner refers to two recent decisions dealing with the issue raised. The first case, Tibson v. Zahradnick, 581 F.2d 75 (4th Cir. 1978) overturns the decision in Tibson v. Commonwealth, 216 Va. 412, 219 S.E.2d 845 (1975), in which the Supreme Court of Virginia held that the prosecution may use on the issue of guilt statements made without prior warning during a psychiatric examination, so long as the accused was not compelled to answer questions concerning the offense with which he was charged. The court in Tibson v. Zahradnick, supra, disagreed, reasoning that an adequate evaluation of an accused's sanity at the time of the offense or of his competency to stand trial cannot be made absent a candid disclosure to the examiner of the facts surrounding the offense. Thus, the court held that in order to preserve his Sixth Amendment right to explore these psychological defenses, the incriminating statements an accused makes concerning the offense may not be used by the prosecution to prove his guilt. To adapt this holding to the present case, petitioner analogizes that proof of guilt in a normal criminal trial is the functional equivalent of the prosecution's proof of case-in-aggravation in the sentencing phase of a capital trial.

The second case, Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), involves the introduction of psychological testimony during the sentencing phase of a bifurcated capital trial. There, on the trial court's motion the prosecution obtained a psychiartic examination of the accused, but failed to inform him before or during the examination of his Fifth Amendment right against self incrimination. Having never disclosed the existance

of this examination to the defense, the prosecution called the psychiatrist to testify on the issue of dangerousness in support of the state's case-in-aggravation. The court, supra, held the testimony inadmissible on two grounds: first, its introduction constituted unfair surprise, and second, in the absence of a warning against self-incrimination, the accused made no voluntary waiver of his Fifth Amendment rights.

Focusing on the merits of the first claim, I find that neither decision above adequately supports petitioner's claim such that there would be a reasonable and sufficient certainty of success on appeal. Gibson v. Zahradnick, supra, narrowly considers the admissibility of statements relating directly to the circumstances of the offense charged, and their use by the prosecution to prove guilt. It does not consider the use of statements to prove mental state, nor does it draw the analogy between proof of guilt and proof of case-in-aggravation.

Further, since unfair surprise is not in issue in the present case, Gibson v. Zahradnick forecloses further argument based on Smith v. Estelle, supra. The alternative analysis employed in Smith v. Estelle with regard to the admissibility of incriminatory statements is the same Fifth Amendment voluntariness of waiver analysis that the Supreme Court of Virginia employed in Gibson v. Commonwealth, supra, and which was ultimately rejected in Gibson v. Zahradnick. The court in Gibson v. Zahradnick reasoned instead that the Sixth Amendment right to explore psychological defenses demands a full inquiry, uncompromised by the threat of self incrimination, into defendant's mental state. The court's holding that the prosecution is prohibited from using such incriminatory

statements to prove defendant's guilt was based on a finding that defendant's Sixth Amendment rights were violated, and not on a finding of absence of voluntary waiver.

More importantly, however, both Gibson v. Zahradnick and Smith v. Estelle were decided after petitioner's trial. Thus, regardless of their usefulness in theory to sustain an appeal, neither was in fact available to counsel when needed. Further, testimony shows that an assistant of counsel conducted research on the Fifth Amendment issue, but that his unpromising results led counsel to decide not to appeal. [Evidentiary hearing tr. at 270 and 274.] In light of these facts and of the differences noted above, I find sufficient reason for counsel not to have raised on appeal the arguments presented here. I thus conclude that counsel exercised reasonable judgment in deciding not to preserve the objection on appeal, and that this decision resulted from informed, professional deliberation in conformity with the standards of competence discussed above.

In another claim relating to statements made during the psychiatric examination, petitioner contends that his counsel incompetently failed to recognize the conflict between his advice to petitioner to remain silent about the offense charged and his attempt through psychiatric examination to explore possible psychological defenses. Petitioner's claim presumes that such defenses cannot be probed in the absence of statements by the accused concerning the circumstances surrounding the offense. On this issue, the opinions of expert witnesses were in opposition [Evidentiary hearing tr. at 80 and 180 - 182], as appear to be the underlying presumptions in the decisions of Gibson v. Zahradnick

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and Smith v. Estelle, discussed supra. I find adequate support for counsel's conduct within the present state of disagreement, both in the medical and legal professions, on this matter. I thus conclude that counsel's advice to petitioner to remain silent about the offense during his psychiatric examinations was not inadequate representation under the Slayton or Marzullo standards quoted above.

II

Petitioner's second claim relates to his counsel's cross examination of Dr. Pile during the sentencing phase of the trial. On cross, petitioner's counsel, after a few preliminary questions, asked Dr. Pile for his diagnosis of petitioner's mental condition. The doctor responded "I felt he was a sociopathic personality, sexual deviation, rape." [Trial tr. at 934] Petitioner notes that his counsel testified that he was "shocked" upon first reading this diagnosis in Dr. Pile's October 1, 1977 letter to this Court [Evidentiary hearing tr. at 25], that counsel testified that he entertained doubts about the adequacy of Dr. Pile's evaluation based on a one-hour examination [Evidentiary hearing tr. at 25], and that counsel was later uncertain why he had asked for Dr. Pile's diagnosis on cross examination [Evidentiary hearing tr. at 25 and 25]. From this testimony, petitioner contends that his counsel incompetently asked questions which were damaging and void of strategic purpose.

Petitioner further refers to expert opinion [Evidentiary hearing tr. at 9], medical literature, and dicta in Smith v. Estelle, supra, for the proposition that Dr. Pile's one-hour examination was insufficient to establish a diagnosis of sociopath.

and that a minimum of research would have provided his counsel with authority discrediting the predictive value of a medical prognosis of future criminal conduct. Noting that petitioner's counsel testified that he had done no research in connection with the cross examination of Dr. Pile [Evidentiary hearing tr. at 274], petitioner contends that his counsel inadequately prepared for the cross examination.

Petitioner finally asserts that Dr. Pile's testimony prejudiced the jury, noting that two jurors inquired about the characteristics of the sociopathic personality [Trial tr. at 952 - 955], that the prosecution referred to Dr. Pile's diagnosis in its closing argument [Trial tr. 1072 and 1077], and that the jury did not delete the finding of "dangerousness" from its verdict recommending the death sentence.

While petitioner's counsel may have been uncertain at the evidentiary hearing why he questioned Dr. Pile as he did, I find that the trial transcript adequately explains the reasons behind his inquiries. During his cross examination of Dr. Pile, petitioner's counsel inquired as to 1) whether sociopaths have compulsions to commit crimes [Trial tr. at 937], 2) the causes of the sociopathic personality [Trial tr. at 940], 3) the length of time it takes to develop such a condition [Trial tr. at 937], 4) whether the condition could be categorized as an emotional illness or sickness [Trial tr. at 937], and 5) whether such a condition can be treated [Trial tr. at 938 and 939]. In addition, during his closing statement petitioner's counsel argued that petitioner was suffering from an illness that he could not help

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[Trial tr. at 1082 and 1091] and asked the jury to give him the opportunity to obtain treatment [Trial tr. at 1084 and 1086], which the Court finds to be reasonable trial strategy in light of the confession of the petitioner and the overwhelmingly aggravating facts exhibited by testimony in the case.

I find that through this line of questioning, which was repeated on the cross examination of Dr. Dimitris, who had also examined petitioner [Trial tr. at 948, 950 and 951], petitioner's counsel attempted to establish the statutory mitigating factor of extreme mental or emotional disturbance, Va. Code Ann. § 19.2-264.4(B) (Cum. Supp. 1977), his only reasonable defense. Counsel was constrained to prove that petitioner's mental condition was defective. I find that counsel elicited Dr. Pile's testimony in an effort to establish that petitioner was suffering from a mental illness which could be treated. The necessity of placing petitioner's mental state in question, not counsel's incompetence, produced the prejudicial statements. In Reynolds v. Mabry, 574 F.2d 978 (8th Cir. 1978), the court recognized that the introduction of prejudicial testimony in proof of an insanity defense does not by itself constitute inadequate representation of counsel.

Furthermore, Dr. Pile's testimony was not entirely prejudicial or void of strategic value. On the crucial question of the likelihood of future criminal conduct, Dr. Pile's testimony that in certain cases a sociopathic personality can be treated actually weighed in petitioner's favor [Trail tr. at 938]. I thus conclude that counsel's cross examination was the product of informed, professional deliberation, and thus competent under the standards discussed supra.

As to petitioner's contention that Dr. Pile's one-hour examination constituted insufficient clinical predicate for his diagnosis, I find that the expert opinion was equivocal and in basic disagreement over this point [Evidentiary hearing tr. at 66, 90, 204 and 205]. Further, authority questioning the validity of psychiatric predictions of future criminal behavior, while promising for impeachment purposes, would only have undermined Dr. Pile's favorable testimony concerning the possibility of treatment. I conclude then that counsel was competent in not raising these matters during the trial.

III

Petitioner contends that counsel failed to conduct an adequate investigation of the statutory defense of mitigating mental abnormality. Va. Code Ann. § 19.2-264.4(B) (Cum. Supp. 1977). Petitioner refers to United States v. Walker, 537 F.2d 1192 (4th Cir. 1976), and United States v. Taylor, 437 F.2d 371 (4th Cir. 1971), for the proposition that a psychological evaluation performed for one purpose is not sufficient for another purpose, and asserts that since the examining psychiatrists were only requested to evaluate petitioner with regard to his competency to stand trial and to his sanity at the time of the offense, the scope and focus of their investigations were inadequate to explore the statutory mitigating mental conditions. From this, petitioner claims that counsel failed to take adequate steps to prepare the case-in-mitigation, and concludes from the decisions of Wood v. Zahradnick, 570 F.2d 980 (4th Cir. 1978), and

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Brennan v. Blankenship, 472 F. Supp. 149 (W.D. Va. 1979), that counsel's conduct was incompetent.

United States v. Walker, supra, and United States v. Taylor, supra, hold that an examination sufficient to determine competency to stand trial will not serve for an examination sufficient to determine sanity at the time of the offense. The cases note that the former examination requires only a limited investigation of defendant's present state of mind, while the latter requires analysis of defendant's personality at the time of the offense. I do not find, however, that such a difference exists between the examinations petitioner received and an examination sufficient to explore the statutory defenses under Va. Code Ann. § 19.2-264.4(B) (Cum. Supp. 1977).

The mitigating mental factors to be considered under the statute revolve around petitioner's mental state at the time of the offense, a question on which both examinations focused. On this point, both examining doctors testified that their examinations were sufficient to render an opinion concerning the statutory mitigating mental conditions [Evidentiary hearing tr. at 31 and 215]. I thus find that petitioner was adequately examined with regard to the statutory defenses.

Petitioner's use of Wood v. Zahradnick and Brennan v. Blankenship, supra, is inapposite here since both decisions rest on a complete failure to explore available psychological defenses. In addition, in light of the testimonies of the examining psychiatrists that no evidence was found to support a defense of mitigating mental conditions [Evidentiary hearing tr. at 32, 215 and 216], I find that petitioner suffered no pre-

judice from counsel's failure to direct the psychiatric examinations toward these issues. I thus conclude by the standards quoted above that counsel conducted a competent investigation of mitigating mental circumstances.

IV

Petitioner's fourth claim asserts that during the sentencing phase of the trial counsel failed to prepare and request adequate jury questions regarding 1) the meanings of the terms "probability" and "serious act of criminal violence" as found in Va. Code Ann. § 19.2-264.4(C) (Cum. Supp. 1977), 2) the parole guidelines employed in the release of a prisoner incarcerated for life, and 3) the credibility of witnesses, the burden of proof, and the meaning of the term "beyond a reasonable doubt."

In regard to the first of these, the Supreme Court of Virginia has determined that definitional instructions are not necessary for the jury's comprehension of the terms in § 19.2-264.4 (C). Clark v. Commonwealth, 220 Va. ___, 257 S.E.2d 784 (1979). Counsel cannot be incompetent for failing to request an unnecessary instruction. The second of the above instructions was found to constitute reversible error in Hinton v. Commonwealth, 219 Va. 492, 247 S.E.2d 704 (1978). Failing to request an erroneous instruction is not inadequate representation. Concerning the last of these, I find that the jury was adequately informed of the concepts and terms requested, since instructions had been given on each of them during the guilt phase of the trial, which had concluded the day before. I therefore reach the conclusion that petitioner's counsel rendered adequate assistance under the standards enunciated above in not requesting the above instructions during the sentencing phase of the trial.

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Present: All the Justices

LEM DAVIS TUGGLE, JR.

OPINION BY JUSTICE ROSCOE B. STEPHENSON, JR.

v. Record No. 840486

September 6, 1985

COMMONWEALTH OF VIRGINIA

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

This case is before us again, having been remanded from the Supreme Court of the United States. In the guilt phase of a bifurcated jury trial, Lem Davis Tuggle, Jr., was convicted of capital murder for the willful, deliberate, and premeditated murder of Jessie Geneva Havens during the commission of, or subsequent to, rape. Code § 18.2-31(e). In the penalty phase, the jury returned a verdict fixing Tuggle's punishment at death. By so doing, the jury found that the Commonwealth had proved both the "dangerousness" and "vileness" predicates beyond a reasonable doubt. The trial court confirmed the jury's verdict and sentenced Tuggle to death. We affirmed his conviction and sentence. Tuggle v. Commonwealth, 228 Va. 493, 323 S.E.2d 539 (1984).

Tuggle petitioned the Supreme Court of the United States for a writ of certiorari, and on May 13, 1985, in a summary disposition, the Supreme Court granted certiorari, vacated the judgment, and remanded the case to us "for further consideration in light of Ake v. Oklahoma, 470 U.S. ____ (1985)." Tuggle v. Virginia, 471 U.S. ____ (1985). Thereafter, we directed counsel to brief and argue the question of Ake's impact on Tuggle's conviction and sentence.

When we decided Tuggle, a state was not required to furnish a criminal defendant an independent psychiatrist. The Constitution required only that an accused's sanity be evaluated by a neutral examiner. United States v. Baldi, 344 U.S. 561 (1953). In Ake, however, the Supreme Court recognized for the first time that, in certain circumstances, a state is constitutionally required to provide an indigent defendant with the assistance of a psychiatrist.

More specifically, the Court held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one." 470 U.S. at ____. Additionally, the Court held that when "future dangerousness [is] a significant factor at the sentencing phase" of a capital murder case, due process requires that an indigent defendant be entitled to psychiatric assistance on that issue. 470 U.S. at ____. Thus, our task is to determine the effect of the Ake holdings upon Tuggle's conviction and sentence.

I

The facts relevant to the present inquiry are undisputed. Initially, Tuggle filed a motion in the Smyth County General District Court requesting two mental evaluations. One evaluation, pursuant to Code § 19.2-169.1, would determine Tuggle's "capacity to understand the proceedings against him or to assist his attorney in his own defense." The other evaluation, pursuant to Code § 19.2-169.5, would determine whether Tuggle was sane at the time of the offense. The motion alleged that Tuggle had been in the Commonwealth's

penal system f.. a number of years, that h as the subject of a number of psychological evaluations and tests during his confinement, and that, in approximately 1971, he was evaluated at Southwestern State Hospital for mental defects or disorders and had not been informed of the results. The general district court judge denied the motion, finding no probable cause to believe that Tuggle was incompetent to stand trial or insane at the time of the offense.

Shortly after Tuggle was indicted, he moved the trial court for an examination pursuant to Code § § 19.2-169.1 and -169.5, relying upon the reasons previously stated. The Commonwealth's Attorney neither concurred in nor opposed the motion. Although no evidence was presented to the court in support of the motion, the court granted it solely because "this is a capital murder case."

Pursuant to the court's order, Tuggle was admitted to Central State Hospital for evaluation on November 22, 1983. Tuggle's psychiatric evaluation was conducted by Miller M. Ryans, M.D., a forensic psychiatrist, and Arthur Centor, Ph.D., a licensed clinical psychologist. On December 1, 1983, Doctors Ryans and Centor reported to the court that Tuggle was competent to stand trial and that he was sane at the time of the offense. The doctors also stated that they had formed an opinion respecting Tuggle's probability of future dangerousness, but did not report their opinion because it had not been requested.

The report reads in pertinent part:

> On the basis of psychiatric interview, psychiatric evaluation, psychological interview, psychological testing, psychological evaluation, neurological examination, encephalographic examination (EEG), reports of ward

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> behavior, and other available information, we are of the opinion that [Tuggle] is competent to plead and stand trial in that he does not lack substantial capacity to understand the proceedings against him or to assist in his own defense.
>
> We are also of the opinion that [Tuggle] was competent at the time of the alleged crime or crimes in that he was not suffering from a defect of reason due to disease of the mind or defect of the mind and knew the nature, character and consequences of his acts and the difference between right and wrong. Furthermore, we are of the opinion that [Tuggle] was not suffering from a loss of volition due to disease of the mind or defect of the mind at the time of the alleged crime or crimes; he was not suffering from an irresistible impulse.
>
> Because [Tuggle] is charged with a capital crime, we advised him of his Miranda Rights to have counsel present as well as the other Miranda Rights relative to the substance of our interviews being used at a hearing if he is convicted of capital murder. [Tuggle] waived his Miranda Rights and signed such a waiver. We have formed an opinion as to the issue of the probability of future dangerousness but we are not reporting it to the Court at this time because we were not requested to do so.

On December 27, 1983, Tuggle's counsel moved for an examination by C. Robert Showalter, M.D., a forensic psychiatrist, to determine Tuggle's sanity at the time of the offense and his competency to stand trial. Counsel based the motion on the belief that Tuggle was "entitled to be examined by a psychiatrist or group of psychiatrists chosen by counsel for the Defendant because of the seriousness of the charges heretofore lodged against the Defendant." (Emphasis added.) Following argument on January 3, 1984, the trial court denied the motion. The court observed that Tuggle previously had been evaluated at his own request, that the trial date was close at hand (14 days), and that logistical problems would cause a further evaluation to be cursory at best. The trial judge stated that he had previously "granted the motion for an evaluation because of the seriousness of the case." (Emphasis added.)

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We affirmed this ruling, noting that Tuggle did not premise his request for a private psychiatrist upon a need to rebut evidence of future dangerousness. 228 Va. at 503, 323 S.E.2d at 544-45. Additionally, we held that whether a second evaluation was warranted was "a matter resting within the sound discretion of the trial court, and that no abuse of discretion had been shown. Id. at 503, 323 S.E.2d at 545.

Neither party presented psychiatric evidence at the guilt phase of Tuggle's trial. At the penalty phase, however, Dr. Center testified that Tuggle "shows a high probability of future dangerousness." Tuggle objected to this testimony solely on the ground that he was examined without the benefit of counsel. We rejected this contention, concluding that Tuggle voluntarily, knowingly, and intelligently waived his right to counsel. 228 Va. at 515, 323 S.E.2d at 552.

II

First, we consider the effect of Ake on the guilt phase of Tuggle's trial. As previously noted, the Supreme Court held that a state must assure an indigent defendant "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense" when the defendant "demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial." 470 U.S. at ____. Thus, before an indigent defendant is entitled to such psychiatric assistance, he must make a "threshold showing to the trial court that his sanity is likely to be a significant factor in his defense." Id.

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These are the facts in Ake: Ake was charged with murdering a couple and wounding their two children. During pre-arraignment confinement and at arraignment, which was just four months after the offenses, Ake's behavior was so bizarre that the trial judge sua sponte ordered him to undergo a psychiatric examination. A psychiatrist diagnosed Ake as a probable paranoid schizophrenic and recommended an extensive psychiatric evaluation to ascertain whether Ake was competent to stand trial. The psychiatrist reported: "At times [Ake] appears to be frankly delusional . . . . He claims to be the 'sword of vengeance' of the Lord and that he will sit at the left hand of God in heaven."

Thereupon, Ake was committed to an Oklahoma state hospital for an examination respecting his competency to stand trial. The chief forensic psychiatrist at the hospital advised the court that Ake was not competent to stand trial. The court then conducted a competency hearing, at which a psychiatrist testified:

> [Ake] is a psychotic . . . his psychiatric diagnosis was that of paranoid schizophrenia--chronic, with exacerbation, that is with current upset, and that in addition . . . he is dangerous . . . . [B]ecause of the severity of his mental illness and because of the intensities of his rage, his poor control, his delusions, he requires a maximum security facility within--I believe--the State Psychiatric Hospital system.

The court found that Ake was incompetent to stand trial and committed him to the state mental hospital.

Six weeks later, the chief forensic psychiatrist advised the court that Ake had become competent to stand trial. Ake was taking 200 milligrams of Thorazine, an antipsychotic drug, three

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times daily. ...e psychiatrist informed th :ourt that if Ake continued taking that dosage of Thorazine, his condition would remain stable. The State then resumed prosecution of Ake.

At a pretrial conference, Ake's counsel informed the court that Ake would raise an insanity defense. Ake's attorney claimed that a psychiatrist would have to examine Ake regarding his mental condition at the time of the offense for the attorney to adequately prepare and present an insanity defense. Although Ake was confined to the state hospital for three months, no inquiry had been made into his sanity at the time of the offense, and Ake was an indigent who could not afford to pay for a psychiatrist. His attorney requested that the court either arrange for a psychiatric examination or provide funds to allow the defense to arrange an examination. The trial judge denied both requests.

At the guilt phase of his trial, Ake's sole defense was insanity. Although his counsel questioned each of the psychiatrists who had examined Ake at the state hospital, none testified about his mental state at the time of the offense because none examined him on that point. The prosecution then asked each psychiatrist if he had performed or seen the results of any examination diagnosing Ake's mental state at the time of the offense. Each doctor replied that he had not. Thus, no expert testimony concerning Ake's sanity at the time of the offense was introduced for either side.

The court informed the jurors that Ake could be found not guilty by reason of insanity if he did not have the ability to distinguish right from wrong at the time of the alleged offense. They were also instructed that Ake was to be presumed sane at the

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time of the crime unless he presented evidence sufficient to raise a reasonable doubt about his sanity at that time. The jurors were told that if Ake raised such a doubt in their minds, the burden of proof to prove sanity beyond a reasonable doubt shifted to the State. By its verdict of guilty on all counts, the jury rejected Ake's insanity defense.

The State requested the death penalty at the sentencing proceeding. Neither side presented new evidence. The prosecutor, in establishing the likelihood of Ake's future dangerous behavior, relied significantly on the testimony of the state psychiatrists who had examined Ake, and who had testified at the guilt phase that Ake was dangerous to society. Ake did not have an expert witness to rebut this testimony. By its verdict, a jury sentenced Ake to death on each of the two murder counts. The jury also sentenced him to 500 years' imprisonment on each of the two counts of shooting with intent to kill.

The facts of Ake clearly establish that Ake demonstrated to the court that his sanity at the time of the offense would be a significant factor at trial. His bizarre behavior at arraignment and while in jail prior to arraignment caused the trial judge sua sponte to order a psychiatric examination. The court found that Ake was mentally ill and incompetent to stand trial less than six months after he committed the offenses. There was abundant evidence presented to support this finding and none to refute it.

As the Supreme Court observed, Ake made a "threshold showing to the trial court that his sanity

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[was] likely to be a significant factor in his defense." Indeed, insanity was his only defense. Nevertheless, Ake was never examined for an evaluation of his mental state at the time of the offense. Thus, Ake never was afforded the opportunity to obtain and present the only evidence germane to his defense, i.e., "the ability to distinguish right from wrong at the time of the alleged offense." 470 U.S. at ____.

Tuggle's facts pale when they are contrasted with Ake's. Throughout the trial, the court had an opportunity to observe Tuggle's appearance and demeanor. Nothing in the record suggests any bizarre behavior by him in court or that counsel claimed such behavior ever occurred at other times and places. Had counsel been aware of any abnormal conduct, it is reasonable to believe that they would have reported it. They made no such report. On the other hand, the report of Doctors Ryans and Centor indicates that they thoroughly examined and evaluated Tuggle and states unequivocally that he was sane at the time of the offense and competent to stand trial.

It is true that Tuggle received psychiatric testing while in the Commonwealth's penal system, but such examinations are routine. Tuggle never attempted to introduce the test results; thus, the trial court reasonably could assume that they would not support his motion. Indeed, when Tuggle requested a private psychiatrist, he made no showing to the trial court that his sanity was likely to be a significant factor in his defense. Nothing was presented except the motion containing counsel's conclusory statement that Tuggle was "entitled to be examined by a psychiatrist

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or group of psychiatrists chosen by counsel or the Defendant because of the seriousness of the charges." Ake makes clear, however, that an indigent defendant does not have "a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." 470 U.S. at ____.

Tuggle contends, nevertheless, that merely by ordering the psychiatric examination pursuant to Code §§ 19.2-169.1 and -169.5, the trial court, as a matter of law, found probable cause. Thus, he argues, the probable cause standard is the equivalent of the threshold "significant factor" test in Ake.

It is true that these two statutes provide for an examination if "the court finds, upon hearing evidence or representations of counsel, that there is probable cause" to believe either that a defendant lacks competency to stand trial, Code § 19.2-169.1, or that he was affected by mental disorders at the time of the offense, Code § 19.2-169.5. The record is clear, however, that counsel did not make such a showing to the court either by evidence or representations. The court ordered the examination solely because "this is a capital murder case."

We conclude that Tuggle failed to make the requisite Ake threshold demonstration. He did not demonstrate to the trial judge that his sanity at the time of the offense would be a significant factor at trial. We hold, therefore, that when its ruling is reexamined in light of Ake, the trial court did not err in denying Tuggle's request for an independent psychiatrist to assist in his defense in the guilt phase of his trial.

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III

Next, we consider Ake's effect on the penalty phase of Tuggle's trial. Ake holds that when the prosecution in a capital sentencing proceeding presents psychiatric evidence of an indigent defendant's future dangerousness, due process requires that a state provide the defendant the assistance of a psychiatrist on the issue. 470 U.S. at ____. In Tuggle, the Commonwealth presented psychiatric evidence that Tuggle "shows a high probability of future dangerousness."[1] Therefore, even though Tuggle's trial and direct appeal before us predated Ake, we conclude in light of Ake that the trial court erred in denying Tuggle's motion for an independent psychiatrist to rebut the Commonwealth's psychiatric evidence of future dangerousness.[2]

Our inquiry, however, does not end here. The General Assembly has provided that the death penalty shall not be imposed on one convicted of capital murder unless the Commonwealth proves beyond a reasonable doubt (1) "that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society," or

[1] Tuggle did not object to the admissibility of this evidence on the ground that he had been denied access to an independent psychiatrist. Instead, he objected on the ground that the psychiatric examination was performed without the benefit of counsel. We rejected this contention because Tuggle voluntarily, knowingly, and intelligently had waived his right to counsel. 228 Va. at 515, 323 S.E.2d at 552.

[2] We note, however, that Tuggle never requested a psychiatrist to rebut future dangerousness, but only to reevaluate him as to sanity and competency to stand trial. 228 Va. at 503, 323 S.E.2d at 544-45.

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(2) "that his conduct in committing the of nse was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim." Code § 19.2-264.4(C); see also Code § 19.2-264.2. The first of the above-stated aggravating factors is the so-called "dangerousness" predicate. The second is the so-called "vileness" predicate. Therefore, when either predicate is proved beyond a reasonable doubt, a jury may impose the death penalty.

The trial court permitted the jury to consider both aggravating factors under an instruction which parallels the statute.[3] The jury found that both the "dangerousness" and

[3] The instruction reads:

> You have convicted the defendant of an offence which may be punished by death. You must decide whether the defendant shall be sentenced to death or to life imprisonment. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:
>
> (1) That, after consideration of his past criminal record, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or
>
> (2) That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.
>
> If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt either of the two alternatives, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment.
>
> If the Commonwealth has failed to prove either alternative beyond a reasonable doubt, then you shall fix the punishment of the defendant at life imprisonment.

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"vileness" predicates had been proved beyond a reasonable doubt.[4] Thereafter, pursuant to Code § 19.2-264.5, the trial court ordered a thorough investigation into Tuggle's history to determine whether the death sentence was appropriate and just. After considering the report and additional evidence, the court confirmed the verdict and sentenced Tuggle to death.

We reviewed Tuggle's death sentence as mandated by Code § 17-110.1. In doing so, we recited certain facts which are also relevant here:

> Approximately 9:30 a.m. on June 2, the investigator went to the place where Tuggle said Havens would be found. He found Havens' body at the site. Havens was clad in jeans "down around her knees," a blue and white striped blouse "pulled up to about the armpits," and "black silk panties . . . rolled down somewhat." A portion of the victim's pantyhose was "sticking out of the top" of her jeans, and one of her legs was out of the pantyhose.
>
> An autopsy revealed that the victim's body had an abrasion and a bruise on the left frontal area of the forehead, a small abrasion on the right frontal area of the forehead, an abrasion on the neck, a bite mark on the lower, inner quadrant of the right breast, a number of small bruises on the upper, inner aspect of the right arm, and a bruise on the right thumb and right wrist. Havens also had sustained a large bruise on the upper, inner thigh, bruises on the vaginal vault at the posterior aspect and near the bottom, and a gunshot wound in the chest.

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[4] The sentencing verdict reads:

> We, the jury, on the issue joined, having found the defendant guilty of the willful, deliberate and premeditated killing of Jessie Geneva Havens during the commission of, or subsequent to, rape and having unanimously found after consideration of his past criminal record that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society,
>
> and
>
> having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind and aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.
>
> /s/ Robert C. Brown
> FOREMAN

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> According to the medical examiner the bruises of the vagina indicate penetration of the vaginal vault by something, a penis, a finger, an object, something." The medical examiner testified that both the bite mark on the breast and the bruising around the vagina occurred while Havens was alive. He also testified that no semen or spermatozoa was found in Havens' vagina, but that semen was found in the rectum, indicating "penetration and ejaculation into the rectum."
>
> A forensic odontologist testified that he examined the bite mark on the victim's right breast. He compared the mark with models of Tuggle's teeth and concluded "with all medical certainty these marks on the body of Ms. Havens were made by the teeth of Mr. Tuggle." He further opined that Havens was alive and moving when she was bitten.

228 Va. at 501-02, 323 S.E.2d at 544. We concluded that Tuggle's conduct in committing the offense "was outrageously vile and involved depravity of mind." 228 Va. at 517, 323 S.E.2d at 554. We also opined that "the battery to the victim was aggravated and 'more culpable than the minimum necessary to accomplish an act of murder.'" Id.

When a jury makes separate findings of specific statutory aggravating circumstances, any of which could support a sentence of death, and one of the circumstances subsequently is invalidated, the remaining valid circumstance, or circumstances, will support the sentence. Zant v. Stephens, 462 U.S. 862 (1983); see also Poyner v. Commonwealth, 229 Va. ____, ____, 329 S.E.2d 815, 830 (1985).

In Zant, Stephens was found guilty of murder and sentenced to death under Georgia law. The jury based its verdict upon three specific statutory aggravating circumstances, any of which could support the death penalty. The Supreme Court of Georgia, in a later case, invalidated one of the aggravating circumstances found to exist in Zant, because it was unconstitutionally vague.

In a state habeas proceeding, the Supreme Court of Georgia held that Stephens' sentence was valid because it was supported by the other aggravating circumstances. In a federal habeas proceeding, the United States Court of Appeals for the Fifth Circuit set aside Stephens' death sentence. The Supreme Court reversed. It agreed with the Supreme Court of Georgia that the sentence was valid and reinstated Stephens' sentence because it was supported by the remaining two aggravating circumstances. 462 U.S. at ____.

In Tuggle, the jury made a separate, specific finding that the "vileness" predicate had been proved beyond a reasonable doubt. Although Ake requires the conclusion that the trial court erred in denying Tuggle an independent psychiatrist once the Commonwealth had submitted psychiatric evidence on the issue of future dangerousness, we hold, nonetheless, that the error neither impairs nor invalidates the jury's finding of vileness.

Accordingly, we reaffirm Tuggle's conviction and sentence.[5]

Affirmed.

[5]The Attorney General suggests that the trial court's error requires that the case be remanded for resentencing. This court, however, is not bound to accept the suggestion of a party concerning a question of law. Orloff v. Willoughby, 345 U.S. 83, 87, reh'g denied, 345 U.S. 931 (1953).

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